Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

James McGuire, Lorraine McGuire, and Marital Minor Child,
PETITIONERS, Pro Se

vs.

Rock County, Rock Co. Board of Supv., Village of Brooklyn, Village of Brooklyn Police Dept., Dean A. Cornford, Terry G. Maybee, Thomas A. Schroeder, Craig Knutson, Charles A. Holznecht, Howard L. Erickson, James A. Dilley, Curtis N. Fell, Frank D. Dubanowich, Thomas W. Gehl, Arthur R. LeFeber, William Roberts, David Jon O'Leary, Thomas G. White, Stephen Carpenter, Gary L. Luhman, Richard T. Werner, Four Unknown Defendants,
RESPONDENTS

On Petition For Writ of Certiorari
To The 7th Circuit Court of Appeal

PETITION FOR WRIT OF CERTIORARI

James McGuire, Lorraine McGuire, and Marital Minor Child, Pro Se Petitioners
mailing address: P.O. Box 17
Belleville, WI 53508

55pp

1. Was nonexigent nighttime warrantless police entry into private dwelling to perform purported welfare check of home's occupants a violation of petitioners constitutional rights to privacy and freedom from unreasonable search and seizure?

2. Was it reasonable for extraterritorial deputy sheriff to make warrantless nonexigent entry into petitioners' fenced-in yard with gate, approach house, and wait only 10 seconds after allegedly knocking on outside door of house (instead of using a lighted functioning doorbell) before crossing home's threshold--for stated reason that home occupants failed within 10 seconds to respond to deputy's alleged knocking?

3. Did government officials' use of groundless criminal complaint to suppress petitioners exercise of 1st Amendment right seeking redress for police misconduct violate one petitioner's due process rights under 4th and 14th Amendments?

4. Where judicial official knew or should have known at outset of case he both lacked subject matter jurisdiction and lacked personal jurisdiction as well, where he had no discretion to act in a judicial role, is he entitled to protection of common law judicial immunity for his deliberate conduct not an integral part of judicial process which violates a citizen's clearly established due process rights?

5. Did citizen have a reasonable 4th Amendment expectation of privacy, equal protection of the law, and freedom from

unreasonable government search inside private curtilage consisting of fence-enclosed yard and within first room of private dwelling (enclosed kitchen porch under unified roof, with its door closing to outside of the house) where police stipulate they made nonexigent entry into private dwelling without knocking and announcing their lawful purpose before crossing home's threshold?

6. Where upon finding an abandoned car in a ditch, and possessing no articulable objective facts to indicate personal injury nor property damage nor criminal wrongdoing, was it reasonable for police to make subsequent covert nonexigent warrantless entry into petitioners' private curtilage and into first room of private dwelling, prior to encountering any occupant within?

7. Where record on appeal shows undisputed fact that no petitioner gave verbal consent for police to enter home, that occupant first encountered police within inner sanctum of home, and that police failed to recall any subsequent physical gesture on her part to show retroactive implied consent , and where police admit to not using home's outdoor doorbell prior to entering darkened first room of the home, does consent doctrine as exception warrant requirement provide for presumption home occupant finding police present within its inner sanctum of home has ability to give a voluntary informed waiver of the constitutional rights of herself and of her family members? Or does this fact circumstance indicated coerced consent?

7. Did petitioners possess legal right

under 9th Amendment (tied with 4th and 14th Amendments) to use reasonable force to protect their child and ward off government officers' unlawful aggressive seizure of their persons inside private family dwelling?

8. Under 4th Amendment, can lower court base its reasonableness determination as to warrantless police entry into private curtilage and into dwelling enclosed within (for police-claimed need to do a "welfare check") solely on officer's state of mind, or does it require an objective standard which government officer(s) must state articulable facts presenting to police prior to crossing home's threshold that reasonable indicate someone inside the residence is injured and in immediate need of medical assistance?

9. Where record reveals police interrogation of petitioners inside private dwelling was designed to elicit confession from one home occupant as to having committed a civil nonjailable traffic offense hours earlier, does need for such questioning qualify as an exigent exception to 4th Amendment warrant requirement?

10. After making warrantless entry into private curtilage and dwelling, did subsequent police failure to inform Petitioners of their Miranda rights prior to accusatory questioning within the dwelling violate petitioners 5th Amendment rights?

11. Did extrajurisdictional officers possess official capacity to go outside their limited police jurisdictions and make nighttime warrantless entry into

petitioners' private dwelling, either to follow up on investigation of finding abandoned car in ditch or to perform nonexigent welfare check--where government records of alleged "mutual aid requeser" produced in its usual coure of business are absent of any indication that such request occurred?

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parties. Certificate of Service is attached to our petition. Pursuant to Supreme Court 8/23/00 Order issued from Clerk of Court, this petition is timely filed (within 60 days of that order) and Clerk of Court's office still holds our $300.00 check payment for docketing fee.

Table of Authorities

A. Involved Constitutional Provisions

(1) United States Constitution

a) Article III (supervisory/appellate power)

b) Article IV (state citizens entitled to privileges and immunities as citizens of the several states & federal power over manner and effect of state acts, records, and proceedings)

c) First Amendment brf. p. 25
(right to redress government grievance)

d) Fourth Amendment brf. p. 1, 9-12, 20, 21, 25

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

e) Fifth Amendment brf. p. 25

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

f) Sixth Amendment brf. p. 16, 25

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, and which district shall

have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him..."
g) Ninth Amendment p. 14, 16, 19, 25
"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
h) Fourteenth Amendment brf. p. 14, 25
"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due proeess of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(2) Wisconsin Constitution
a) Article XIV, Section 13 p. 16
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B. Statutes

[1] Involved Federal Statutes:

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Fed. Rules of Evid. 803 (6,8) and 804 (7, 10) p. 28

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28 U.S.C. Section 1343(a)(3,4) (Civil Rights Act) p. 1
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[2] Involved State Statutes
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C. Case Citations

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Payton v. New York, 445 U.S. 573 at 589, 590 (1980), p. 20-21
P.C. v CC., 161 Wis. 2d 277, 297, cert. denied, 112 S. Ct. 338 (1991) p. 27
Roe v. Wade, 410 U.S. 113, 152-53, 93 S. Ct. __ (1973) p. 10
State v. Barret, 96 Wis. 2d 174, 180 (Wis. Supreme Ct. 1980) p. 29
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State v. Mitchen, 8 Kan.App.2d 265, 268 (Kan.App., 1982) p. 15
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Jurisdictional Statement

Federal courts hold jurisdiction over all causes of action under 42 U.S.C. Section 1983, pursuant to 28 U.S.C. Sections 1331 and 1343(a)(3, 4), arising under Civil Rights Act and involving federal question as to Counts in our 6/12/98-filed Complaint. Causes of action include gross invasion of privacy, illegal search and seizure/detainment, malicious prosecution as egregious due process violation, coercive questioning in absence of Miranda warning, right to redress grievance of police misconduct, equal protection of the law, and citizens' right to use reasonable force to ward off government officer's aggressive unlawful seizure of their persons inside family dwelling. Appellate jurisdiction is conferred by Article III of Constitution of United States of America and 28 U.S.C. Section 1291. The 7th Circuit made a critical decision here which dramatically chips away at 4th Amendment's aim to protect our citizenry's rights involving private matters and private dwellings, concerning the first room to a house where police claim its outside door was unlocked--with subjective intent of police rendered as sole basis for nighttime warrantless entry to do alleged "welfare check", and where the government freely stipulates police lacked articulable objective facts to indicate an exigency required entry. McGuires have always asserted: no welfare check was imperative nor did it actually take place, and that we held 4th Amendment protection throughout our entire private dwelling.

Stipulated and Undisputed Fact

Certified docket entries prepared by the district court clerk are considered to be

proper part of the record upon appeal. The "summary page"/page C-1 of Rock Co. Sheriff Dept. 12/31/96 dispatch records within certified docket entry {Dkt. #120} refers to James McGuire ("JM") as a suspect before police made warrantless entry. Dilley made 10:20 p.m. dispatch request for backup to go to McGuire home, with Roberts then quickly covering a one mile distance in only one minute to arrive at house at 10:21 p.m.--only existing on Rock County records {Dkt. #120/p. 1; Dkt. Dkt. #139/p. 1}

Respondents made sworn stipulations and admissions as to the following facts existing on 12/31/96: [1] At the scene of McGuire car sitting in a ditch, officers found no evidence of personal injury. {Dkt. #59/Admit #10; Dkt. #64/Admit #10; Dkt. #58/Admit #10; Dkt. #119/Admit #11; Dkt. #112/Admit #12} [2] The police did not possess a judicial warrant to search the home nor to arrest any McGuire family member. {Dkt. #59/Admit #1, #2; Dkt. #65/ Admit #1, #2; Dkt. #58/Admit #1, #2; Dkt. #119/Admit #1, #2; Dkt. #112/Admit #1, #2} [3] In the vicinity where abandoned McGuire vehicle was found in ditch, there was low visibility due to fog, and road conditions were slippery. {Dkt. #64/Admit #4, #5; Dkt. #112/Admit #5; Dkt. #119/ Admit #4, #5; Dkt. #58/Admit #4, #5, Dkt. #59 Admit #4, #5; (see Dkt. #54/p. 1, tow truck driver swn stat.} [4] Prior to police home entry, no officer witnessed any McGuire family member committing a crime nor committing any moving traffic violation. {Dkt. #59/Admit #6, #7; Dkt. #64/Admit #6, #7; Dkt. #58/Admit #6, #7; Dkt. #112/Admit #6, #7} [5] At the scene of vehicle sitting in a ditch, officers found no evidence of property damage, nor of alcohol, drugs, or weapons. {Dkt. #59/

Admit #8, #9; Dkt. #64/Admit #8, #9; Dkt. #58/Admit #8, #9; Dkt. #112/Admit #9, #11} [6] Fell used force against James McGuire inside McGuire home in presence of his wife and their child, with all three family members located within two feet of Fell at time he initially used physical force against Mr. McGuire. {Dkt. #59/Admit #14, #16; Dkt. #58/Admit #14, #16} [7] Fell failed to appear as prosecution witness in any criminal court hearings (later two in re motion for dismissal) against Mr. McGuire for "resisting an officer". {Dkt. #59/ Admit #28} [8] As officers were taking handcuffed Mr. McGuire to Fell's squad car during the police incident, Lorraine McGuire shouted outside her house about calling 911 regarding officers taking her husband. {Dkt. #89/p. 4; Dkt. #200/p. 2, 5, Roberts testi.; Dkt. #92/p. 3; Dkts. #120, and #152/10:23-10:25 p.m. Roberts' radio message} [9] During the police incident, Mrs. McGuire registered her complaint against Fell to Rock Co. Sheriff Dept. jail staff concerning his home entry and his conduct inside our home. {Dkt. #114/ 1st paragr., Rock Co. Ans. to Interr.#1; Dkt. #89/p. 5; Dkt. #79/paragr. 4 on Exh. A-4} [District trial judge made ruling, over McGuires' objection, that the jury was not to be informed of anything that happened at the jail. {Dkt. #200/p. 6, 7 (bottom of) 11/23/98 pretrial conference}

Undisputed facts include: 1) fenced-in yard held the farmhouse {Dkts. #89 and #92, attached layout/trial exh. 28--Sides A and B (layout of curtilage and home's interior), 2) there was an outdoor lighted functioning doorbell outside the house, which during the police incident two tow truck drivers saw and used. {Dkt. #54/p. 1 , 2, W. Peckham swn. stat.; Dkt. #89/p. 2,

, 2, W. Peckham swn. stat.; Dkt. #89/p. 2, 4, 7; Dkt. #149/p. 40; Dkt. #200/p. 17, L. Imel testim.; Dkt. #200/p. 7, L. McGuire testi.}, 3) enclosed kitchen porch was part of house structure itself, outer house walls completely surrounded that enclosed room {Dkts. #89, #92/Sides A, B}, 4) McGuire family regularly used enclosed kitchen porch for year round locked storage of personal belongings and for pet area, and as 3-season work/play area {Dkt. #149/p. 33; Dkt #200/p. 2, 5} 5) McGuires kept curtains hung in windows of kitchen porch, maintained carpeting on its floor, and regularly kept its outside door locked {Dkt. #149/p. 33; Dkt. #200/p. 16-17, L. Imel testim.; Dkt. #200/p. 5, L. McGuire testim; Dkt. #207/p. 3, J. McGuire testi.} 6) At trial Fell agreed to accuracy of trial exh. 28 (home layout) {Dkt. #207/ p. 10 of Fell testim.}, 7) Fell stated he took several steps across the kitchen before viewing Mr. McGuire sleeping inside dining room {Dkt. #200/p. 3, 13}, and 8) A 4-foot dog door hung in doorway between kitchen and dining room. {Dkt. #149/p. 28, lines 17-19; Dkt. #200/p. 17, L. Imel testim.}; Dkts. #89, #92/Exhibit, Side B; Dkt. #200/p. 2, L. McGuire testim.}; 9) Before trial, the officers did not acknowledge the enclosed kitchen porch existed {Dkt. #119/Admit 12, 13, 20; Dkt. #59/Admit 19, 21, 22} but did a turnabout close to/at time of trial, then simply claiming the home's outside door was unlocked and stating they somehow failed to see or use our lighted outside doorbell--while simultaneously admitting to crossing our home's threshold into first room without any occupant's knowledge. {Dkt. #200/p. 2 of 11/24/98 Roberts testi.; Dkt. #200 & #207--p. 2, 11, 12 Fell test.}

Record on appeal as to Fell's initial entry across home's threshold: [1] "'Request 11: That no emergency situation existed on 12/31/96 which necessitated you to make warrantless entry into plaintiffs' Green County residence.' Response: Admit that it is now known no such situation existed'..." {Dkt. #59/ excerpt, Fell Admit #1}

[2] "defendant Fell...has no absolute recollection of whether the kitchen door opened to an enclosed porch or whether Roberts entered the kitchen" {Dkt. #59/ excerpt, Fell Admit #19]

[3(a)] "Schroeder: But why specifically did you go to the residence?
Fell: Just to check on--to make sure they were okay. Um, I needed their information because if there was any substantial damage at all, to the vehicle, I--I--I was required to fill out an accident report. And I would have to have that to do it."

[3(b)] "Fell: ...Um, I then went up and knocked on the outside door to the porch.
Schroeder: Did you see a bell?
Fell: No, I don't remember there being a doorbell there.
Schroeder: What did you do after you knocked on the door?
Fell: I waited (laugh), uh, probably at least 10 seconds, um, when no one answered--
Schroeder:--Did ycu get a response?
Fell: No.
Schroeder: And what if anything did you do after not getting a response to that knocking?
Fell: Um, I checked the door, it was unlocked. I figured they couldn't hear me so I went to the--to the door to the residence, inside the porch, so I could

knock where someone could hear me." {Dkt. #200/p. 2, Fell testim.}

[4] "Mrs. McGuire: When you arrived at my home, on December 31st, 1996, did you press the doorbell on the outside of my home?
Fell: I don't remember there being a doorbell there. Um--I know that I knocked. I specifically remember that, and after I saw it I may have rung it.
Mrs. McGuire: How long after you knocked or possibly rang the doorbell, did you see anyone responding or that you had any idea that anyone had heard you either ringing or knocking?
Fell: I didn't hear anybody respond. That's why I had stepped onto the porch." {Dkt. #207/p. 11, Fell testim.}

[5] "'After a lady answered our ringing of the doorbell'...'The moment I was inside the house, I felt extremely uncomfort-able being there at all, as I got the strong impression that something bad was happening, or had already happened. The lady, who I now know to be Lorraine McGuire, had a red face, looked unhappy, and upset.'...There was still two police cars parked out in the driveway of the residence when we left.'" {Dkt. 54/p. 2, tow truck driver W. Peckham swn. stat.}

[6] "Officer Roberts does not recall...; in any event the door at the top of the steps leading up to the porch was not locked..." {Dkt. #119/Ans. to Interr. #7}

[7] "I went to the McGuire residence because the Green County Sheriff's dispatcher asked me to go there..." {Dkt. #119/Roberts Ans. to Interr. #1}

[8] "'Mrs. McGuire: Do those records show that Green County asked anyone to send anyone to our home? On that night?
K: Jenson: "It does not say anywhere on

our records where we sent any officer to your residence." {Dkt. #200/p.27, Green Co. Sheriff dispatcher K. Jenson testim.}
[9] "Mrs. McGuire: Okay. Uh, which, what door did you say you knocked on?
Roberts: The interior door to the, uh, main part of the building."
Mrs. McGuire: The main part of our building, meaning, which part of the building?
Roberts: Yy, I believe that, uh, the door access there is to the kitchen.
Mrs. McGuire: So you don't consider an enclosed porch with carpeting and windows and a storm door the main part of the building?
Schroeder: Objection as to relevance.
Court: Sustained." {Dkt. #207/p. 4 of Roberts trial testimony}

Record on appeal as to nonexigency: [1] "Admit. However, no driver or passenger remained at the scene of the accident, so the attending officers could not tell at that point whether the accident had produced any personal injuries." {Dkt. #64/Roberts Admit #10} [2] "At the time of the incident, it was not possible to tell for sure whether there had been personal injury." {Dkt. #59/excerpt, Fell Admit #10}

Portion of Petitioners' testimony on record on appeal as to warrantless entry and search: [1] "...I was awakened by some man kicking me, hitting me with a stick or flashlight, and shouting at me to "Get up!" {Dkt. #92/p.2}; [2] "I remember locking the storm door." {Dkt. #207/p. 3, J. McGuire testim}; [3] "No that's not true. I remember having locked the storm door before I--after I had let the dog into the porch. So that--up to the point where Mr.Fell awoke me by kicking, hitting , shouting, I would say that's my

contribution to how Fell came in" {Dkt. #149/p. 33, J. McGuire oral depo.};

[4] "Was I awake when this man--of course I'm gonna believe my wife when she says this man forced the door open on her, and forced his way past her into my house looking for me. Uh, was I sleeping, yes I was. Did I ask him, later, to leave my house, yes I did. And no he did not." {Dkt. #200/p. 31, J. McGuire trial testim.};

[5] "'I didn't see him approach me. I didn't see him come upon me'...'and he did wake me up by hitting and kicking. I felt that, I didn't see him, until a little bit later.'" {Dkt. #207/p 4-J. McGuire testi.}

[6] "'I went back, opened, opened my kitchen door into our enclosed porch, and flipped on the light. And was surprised to see that person out in my porch. Which is unusual, because that porch is living space.'...'And someone pushed it back open.' ...'And when he pushed it open, it pushed me back, and I did step backwards. So I wouldn't fall like a pancake backwards.' ...'I was stunned. I had been sleeping before he came. Not knowing what he was doing there, why he came in. Why he pushed his way in.'" {Dkt. #200/p. 2, L. McGuire testim.}

[7] "He seemed angry from the moment he shut the door behind him. When he came into our kitchen." {Dkt. #200/p. 7, L. McGuire testim.}

[8] "'My testimony was that he pushed his way in my house. Strode past me, walking through our house, searching for whoever "he" was. And I was so stunned, I didn't know who "he" was, but now I believe that "he" to be my husband.' And ... deputy Fell, after he ordered me into the dining room, and grilled me,

yes he did. That's my testimony--he started hitting and kicking my husband. Yes." {Dkt. #200/p. 8, L. McGuire test}

[9] "Schroeder: When is that they you believe deputy Fell attempted to draw his gun?
Mrs. McGuire: After my husband first started answering questions--there weren't very many. And my husband put his two front thumbs into his pockets like this. And deputy Fell, as he was talking, and deputy Fell went off the wall. That's when he did." {Dkt. #200/p. 9, L. McGuire testimony}

[10] "As my husband was being roughed up in front of our computer desk, my husband told Fell 'I want you to leave my house NOW.', but Fell refused, roaring "I'm not through with you yet." {Dkt. #89/p. 4}

Introduction Summary

The case's significance case goes beyond the particular facts and parties involved. Its most critical issue speaks to our citizenry's 4th Amendment and due process rights inside private homes, to enjoy personal privacy and be free of unreasonable search and seizure, where subsequent to nonexigent nighttime warrantless entry, police claim only subjective intent to do a "welfare stop" after finding an abandoned car in a ditch. "Police officers...must knock on the door and announce their identity and purpose before attempting entry." United States v. Richards, 520 U.S. at 387. Police concession as to the lack of exigency and lack of probable cause of criminal wrongdoing prior to their entry and search --resulting in charge of "resisting an officer" against one occupant for being "uncooperative" upon being woken up by officer, and for trying to comfort and

hold his child--demonstrates deliberate abridgement of our personal privacy, due process, and equal protection under the law. When error is of constitutional dimension, summary reversal "should be reserved for palpably clear cases of constitutional error." Eaton v. Tulsa, 415 U.S. 697, 707 (1974).

Warrantless Police Entry Into Private Dwelling Must Be Reasonable

"The constitutional right to privacy extends to the individual's interest in avoiding disclosure of personal matters." Taylor v. Miller, 853 F.Supp 390 (E.D. Ark., 1994) (citing Whalen v. Roe, 97 S. Ct. 869, 876 (1977). Under controlling constitutional standard, Respondents blatantly abridged our clearly established fundamental privacy rights involving matters of marriage, child rearing, and family relationships by unreasonably invading our curtilage and private dwelling, interfering with such aforementioned rights, then exposing our private matters for public record--while making false defamatory and humiliating accusations, as well as maliciously prosecuting one Petitioner for crime of "resisting" aggressive government officer who had forced his way into our house in absence of any reasonable basis. The United States Supreme Court has recognized constitutionally protected privacy rights are those "fundamental" or "implicit in the concept of an ordered society." Roe v. Wade, 410 U.S. 113, 152-53, 93 S. Ct. __ (1973). Under U.S. v. Ortiz, 422 U.S. 891, 895 (1975), 4th Amendment aims to protect our liberty and privacy from oppressive arbitrary government hindrance. Even a person occupying a pitched tent on public camp grounds enjoys a reasonable

expectation of privacy, pursuant to United States v. Gooch, 6 F.3d 673, 677 (9th Cir., 1993). "Police may not enter someone's home ...under exigent circucumstances exception to search warrant requirement based solely on inchoate hunch that injured person might be present; there must instead be concrete facts rendering it reasonable to believe that someone inside needs medical attention", United States v. Arch, 7 F.3d 1300 (7th Cir., 1993)

"Exigent circumstances doctrine provides that warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure warrant", Arch at 1300.

> "An officer's subjective belief that an injured person might be inside does not justify a warrantless entry ... Instead, the government must establish that the circumstances as they appeared at the moment of entry would lead a reasonable, experienced law enforcement officer to believe that someone inside the house, apartment, or hotel room required immediate assistance", Arch at 1304.

"While the Fourth Amendment protects a person's privacy interests in a variety of settings, 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'", Maryland v. Buie, 494 U.S. 341 (citing U.S. v. U.S. District Court, Eastern District of Michigan, 407 U.S. 297, 313 (1972)

"The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." Michigan v. Summers, 101 S. Ct. 191 (1948) (citing Johnson v. U.S.,

333 U.S. 10, 13-14)

The only permissible interpretation of the evidence dictates ruling Mrs. McGuire lacked ability to give after-the-fact voluntary consent for the entry and search of the premises. Both Fell and Roberts testified they entered first room of house without our knowledge or consent in absence of articulable objective fact to indicate anyone inside was injured. Fell swore that when he later confronted Mrs. McGuire inside home's second room, she did not verbally consent for him to enter any part of the residence, Fell failing to recall whether she made any authorizing physical gesture. Roberts swore he crossed home's threshold into home's first room without announcing his presence in order to check on Fell's welfare.

The 7th Circuit's affirmance of 11/98 jury verdict is deficient of proper 4th Amendment analysis and plainly defies controlling consent doctrine. Stipulation as to lack of verbal consent and officers' trial testimony as to lack of any authorizing physical gesture on her part upon encountering her within home's second room (Fell testifying to his own lack of memory) resolves the voluntariness issue. Fell testimony excerpts as to his moving from first room into kitchen: 1] "Um, she either motioned me to come inside when she came back in the room, or she opened the door herself. I can't recall exactly what it was. Um--" {Dkt. #207/p. 3-Fell testi.} 2] "Mrs. McGuire: I'm asking you if I expressly gave you verbal consent to enter my home, any part of my home that evening? Fell: You didn't tell me 'come into my house,' no. You never told me that." {Dkt. #207/p. 3 Fell testim.}, 3] "No maam, I didn't ask to search your home." {Dkt. #207/p. 13, Fell testim.}

The Constitution is clearly violated here, where police lack objective evidence that anyone inside the home needed medical aid, but went ahead to enter our curtilage , cross our homes threshold, entered into our first room, proceeded thru the second room (kitchen) where officers claimed Mrs. McGuire gave after-the-fact consent to "enter the house"), and ended in dining room, where Fell claimed seeing husband sleeping on its floor led him to believe he may need assistance. It was fraudulent to presuppose voluntary consent could be given by person awakened to find police inside her home, and erroneous to presume occupants do not possess percipient privacy expectation within their first room (an enclosed kitchen porch contained within outer walls of house structure and under the unified roof). Police-claimed subjective intent does not rectify absence of objective basis for warrantless entry.

> "'This is not a case where the officers, passing by on the street, hear a shot and a cry for help and demand entrance in the name of the law.' ...'Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. ... 'We are not dealing with formalities. ...The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted.'" McDonald v. United States, 69 S. Ct. 191 (1948), 335 U.S. 451, at 454-456.

Each officer drove down a long driveway to reach the farmhouse, entered our fenced-in yard, ignored a lighted functioning outside doorbell, climbed cement steps,

opened home's outside door, then crossed threshold to begin their search in a darkened interior kitchen porch which was within house structure's outer walls). Coercion implicit in the situation [of sleeping home occupant awakened by noise and stunned to find police present inside her house] deprived her of ability to give informed consent or make voluntary waiver of constitutional rights of herself and of her family members, thereby negating the flawed jury verdict. Governing precedent in Amos v. United States, 255 U.S. 313 (1920) and United States v. Rosario, 962 F.2d 733 (1992), finds presence of coercion negates occupant's ability to voluntarily waive constitutional rights of oneself and of family members inside. Fell's coercive threatening in-home interrogation of ourselves to investigate finding an abandoned car did not in fact or in law constitute a "welfare check".

Stipulated And Undisputed Fact Reveals Constitutional Violations

Respondents' stipulation that police lacked objective fact indicating anyone was injured prior to entering our home tells this Supreme Court all it really needs to determine reasonableness of the warrantless nighttime police entry into our home on 12/31/96. It was a legal oxymoron to tell jury to decide whether occupant gave police retroactive consent for the entry and search. "Under the Fourth Amendment, an arrest--the seizure of a person--occurs 'when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." United States v. Benjamin, 995 F.2d 756, 759 (7th Cir., 1993). District court's finding as to Fell's conduct after he completed covert

warrantless entry is immaterial to question of whether initial crossing of our home's threshold was reasonable, based on all objective facts presenting at moment of police entry. Both 7th Circuit and district court persisted to discount our reasonable expectation of privacy within both our curtilage and within our enclosed kitchen porch prior to police confrontation with Mrs. McGuire inside kitchen itself, in disaccord with standard of United States v. Dunn, 480 U.S. 294, 300 (1987); State v. Waldschmidt , 12 Kan.App.2d 284, (citation ommitted) review denied (1987) (fenced yard considered curtilage); State v. Mitchen, 8 Kan.App.2d 265, 268 (Kan.App., 1982) (enclosed area requiring access through gate considered curtilage). Despite officers' pretending our home's outside door had been unlocked, they should have known --not having probable cause of any criminal wrongdoing on our part nor possessing any reality-based safety concerns--they were violating our privacy when they entered into our fenced yard and later entered the first room of our rural farmhouse without our knowledge: after Fell ignored the lighted outdoor doobell and waited only 10 seconds after allegedly knocking on outside door to enter our house (after 10 p.m., within a completely darkened house) and Roberts swore he did not knock or announce his presence before entering the first room of our home because he found home's outside door unlocked. Before police initiated their New Year's Eve raid upon us in our home, we had all been sleeping. Applying Dunn's four-factor test to the area claimed to be curtilage, the McGuires reasonably expected our privacy to be respected within our fenced-in yard and within every

part of our dwelling. It is undisputed two tow truck drivers used our functioning doorbell during the incident.

Lower court's finding as to Fell's state of mind or, as to level of violence Fell used against McGuire family members, is irrelevant to either the consent question or to the reasonableness analysis of the officers' conduct in making warrantless entry--or to our legal right to resist unlawful seizure and protect our young child from a hostile intruder. That physically assailing grilling of these Petitioners inside our home did materially give rise to our right to resist and to protect our young child, under 9th Amendment (tied with 14th Amendment to U.S. Constitution and Article 14, Section 13 of Wisconsin Constitution. Governing case law, shown in John Bad Elk v. United States, 177 U.S. 529 (1900), United States v. Di Rie, 332 U.S. 581 and State v. Hobson, 218 Wis. 2d at 391 (Wis. Supreme Ct., 1998), upholds a citizen's legal right to use reasonable force to resist unlawful interference with his/her person by government officer under proper circumstance. The trial court should have instructed jury that we possessed this right. For 34 days Rock Co. Sheriff Dept. held Mr. McGuire over for prosecution of 12/31/96 "resisting" charge, using a police-issued "order in slip" threatening re-arrest for noncompliance {Dkt. #3/Comp. Exh. 1}, to force him to face 2/3/97 criminal hearing without prompt probable cause hearing following the 12/31/96 warrantless arrest, on sole basis of Fell's unsworn police report {Dkt. #3/ Compl. Exh. 2; and Dkt. #81/attached Exh. incorporated into 10/5/98 Fell swn. stat.} Rock County Sheriff Dept. utilized their policy of having a designated sheriff

deputy other than the arresting officer to sign a sworn affidavit several weeks after warrantless arrests swearing his belief that the arresting officer's unsworn police report to be true. {Dkt. #80/p. 1,2 Dubanowich swn. stat.; Dkt. #110/Admit #23} The fact Mr. McGuire was deprived of prompt probable cause determination following the arrest speaks to lack of probable cause for the bogus "resisting" charge which Respondents used as leverage in direct effort to coerce family members to waive civil liability for the police misconduct. The malicious prosecution was executed in clear absence of all jurisdiction by officials clearly not entitled to act in a judicial role (in clear lack of subject matter jurisdiction AND lack of personal jurisdiction), and for our refusal to cave in, subjected us to further harassment and retaliatory refusal to drop the complaint. Controlling law finds use of groundless criminal complaints to coerce victims of police misconduct to waive civil liability for their injuries suffered violates due process and is not an integral part of the judicial process for which "judicial immunity" protects any involved official.

"The Government may not prosecute for purpose of deterring people for exercising their right to protest official misconduct and petition for redress of grievances. Moreover, a prosecution under such circumstances would be barred by the equal protection clause." Dixon v. District of Columbia, 394 F.2d 966 at 968 (1968)

Seventh Circuits' affirmance of district court's judgment defies well-established standard as to: [1] citizen's reasonable expectation of privacy within his private curtilage and dwelling, [2] requirement that warrantless home intrusion be serving

a reasonable government interest (having objective justifying rationale), [3] consent criterion requires freedom from coercion to deem person has ability to give knowing and voluntary waiver. Since when does finding police inside one's house amount to retroactive consent?

Pursuant to clear error review standard in Carmel v. Clapp and Eisenberg, P.C., 960 F.2d 698, 703 7th Cir., 1982), there is no reasonable basis in the record to support 7th Circuit's affirmance of final judgment and jury verdict, given: (1) Officers' pretrial stipulations as to lack of exigency in making warrantless home entry; and, (2) Trial testimonies of Fell and Roberts themselves. The officers' charade of having intent to do a "welfare check" and of somehow failing to observe our lighted doorbell outside the house are invalid, given their sole rational was subjective only. While higher courts may give deference to district court findings, clearly erroneous finding of constitutional proportion controlling case's outcome (contradicting stipulated fact), and fact and law demands granting certiorari. What is at stake is every citizen's right not to be grabbed by police in his home for no legitimate reason and then be prosecuted for "resisting" the officer who physically attacked sleeping citizen. We should be free in this country to go to sleep at night without police making covert home entry to wake us up with violence and physical abuse before and during interrogation.

Clear Error and Abuse of Discretion

Clear error and abuse of discretion placed this case in false light to the jury: inaccurate "fact" trial judge had already decided, improperly standard of law

(saying police were lawfully present at the home and were entitled to use force to effect an arrest inside), as to what questions the jury should deliver verdict on, improperly stating consent standard, and as to disregard our clearly established privacy rights. The biggest legal fiction 7th Circuit condones is that any police were entitled to force on us a purported in-home nonexigent welfare check or were entitled to use force against us, or that we could not use reasonable force to ward off unlawful aggressive seizure.

The 9th Amendment tells us the rights of one cannot run roughshod over the rights of another. Its practical interpretation dictates government right to investigate or to perform nonexigent in-home welfare check cannot late at night override our right to privacy in our homes and to be free from unreasonable search and seizure: there must be a good reason, preferably approved by a judicial officer, for police to make entry into a citizen's home. Exigency, as defined, means that an objective emergency must exist. In our case, there was none.

Controlling consent doctrine does not provide for concept that subsequent to completion of warrantless home entry, occupant then discovering police inside inner sanctum has presumed ability to overcome the inherent coercion to give voluntary permission for continuance of the search. The lower courts failed to apply proper standard of reasonableness to the law enforcement officers' conduct. Determination that officers carried out a welfare check was erroneously based on deciding officer's state of mind rather on the presenting objective facts at moment of entry across home's threshold into the first room (enclosed kitchen porch).

Proper inquiry focuses upon objective basis for official intrusion upon constitutionally protected interest of these citizens inside our dwelling. Had the analysis been made as to the reasonableness of the initial police entry onto our curtilage and into our house before officers encountered Mrs. McGuire, the district court would have had to rule police lacked authority to make that warrantless entry. As to accountability for the intrusion, it was imperative for Respondents to have to state facts upon crossing home's threshold indicating someone inside needed immediate medical aid. They instead simply claimed subjective good intent: Fell stated he observed the car in a steep ditch, a child seat installed in abandoned car's backseat , that he recently became a father, and that no one had responded to his knocking on home's outside door. Of course, the failure of these home occupants to respond within 10 seconds after Fell's alleged knocking outside the home cannot be in any way construed as an exigency in itself. It fails to meet constitutional par to accept as okay for police to covertly enter our home without exigency, later confront occupant inside second room of house, who then gave alleged retroactive consent. It is also undisputed fact that no ambulance or medical personnel was ever summoned. The lower courts in this case have made material error affecting millions of innocent law-abiding citizens' right to privacy inside their homes, by presuming McGuire family lacked privacy within our curtilage and within our enclosed kitchen porch.

"The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy

more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home--a zone that finds its roots in clear and specific constitutional terms." Payton v. New York, 445 U.S. 573 at 589 (1980).

"In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not be reasonably crossed without a warrant." Payton at 573, 590. Pursuant to Fed. Rule Civil. Procedure Rule 50, undisputed fact requires 11/98 jury verdict be negated. Fact that Mrs. McGuire was stunned to discover police inside our home's inner sanctum goes legal presumption of lack of ability to give voluntary consent. While disregarding our rational contemplation of privacy within that first room of our home--and oblivious to officers' testimonies admitting they entered home's inner sanctum before confronting Mrs. McGuire--the trial court instructed jury to decide issue of consent on improperly stated legal standard--failing to inform presence of coercion negate's one's ability to make voluntary waiver)--, gave erroneous instruction that Fell carried out lawful act at our home while holding right to use force in making the in-home arrest, while failing to inform jury of McGuires' legal right to resist unlawful interference with our persons and to protect our child. As to privacy expectations, a man's house is his castle. Government breach of entrance to his home is a 4th Amendment issue.

Record reveals Fell's changing memory that home's first room was our enclosed kitchen porch: 1) "...defendant Fell...has no absolute recollection of whether the

kitchen door opened to an enclosed porch or whether Roberts entered the kitchen" {Dkt. #59/Fell Admit #19}

2) "Mrs. McGuire: And do--before today--based upon the documents you submitted to this Court in the last several months--based upon your testimony today--is today the first day that you recall there being a porch to my home? On December 31, 1996?

Fell: Oh I, thought I remembered a porch (laugh) on your home for quite awhile, since then. Um, (pause) you know, your diagram that you drew helped me remember your house a little bit. Um, with the amount of calls we have, and the number of people and houses we (short laugh) deal with, it's not exactly the easiest thing to remember--each and every one we do." {Dkt. #207/p. 10, Fell testim.} 7th Circuit's affirmance of district court judgment defies Constitution's precept that government home intrusion be reasonable. Given stipulations police made nonexigent entry into first room of our home without our knowledge, this Court must rule police were not lawfully authorized to make that entry, and declare the officers did not have the right to force on us an unreasonable "welfare check". Police coercion negated Mrs. McGuires' ability to give voluntary consent upon finding officers present inside our house, and under material error circumstance the jury was not given proper consent criterion requiring consent be a voluntary and knowing waiver of one's constitutional rights. As to our right to privacy: "as a general rule, the question of when the right of privacy must reasonably yield to the right of search must be decided by a judicial officer, not by a policeman or

government enforcement agent." Johnson v. United States, 33 U.S. 10 (1947).

"Warrantless search or seizure is per se unreasonable unless police can show that it falls within one of carefully defined set of exceptions based on presence of exigent circumstances", U.S. v. Bennet, 908 F.2d 189 (7th Cir., 1990) (citing Coolidge v. New Hampshire, 91 S. Ct. 2022, 2042 (1981).) Undisputed is that police held no evidence to indicate a car occupant had been injured. A claim of government need to do an in-home welfare check is properly resolved by requiring articulable objective fact for its basis.

> "We adhere to our well-established rule that such a subjective belief cannot justify a warrantless entry. E.g. Arch, 7 F.3d at 1304. Using an objective standard ensures that there is some control on the reasonableness of police officers' behavior. This kind of external accountability is especially important when warrantless searches of homes are at stake", United States v. Richardson, 208 F.2d 626 at 630, 7th Cir., 2000)

Stipulations reveal clear error of finding that police were lawfully authorized to, and had performed, a purported welfare check inside our home--and prejudicially biased rulings which prevented jury from being informed of critical material facts relevant to outcome of case having direct bearing on witness credibility. When a government officer seizes a family inside their home and questions them, then arrests one occupant for "resisting" (by being "uncooperative" in refusal to answer questions and by going to pick up his child) while purporting to perform welfare stop with official capacity and while

possessing lawful authority to perform such act (under Wis. Stats. 946.41)--he must be held to reasonableness standard; additionally, in this case, the officers must prove they held official capacity in extraterritorial acts at our residence, since the alleged "requesting agency" has no record of making any mutual aid request --despite district court's unfounded ruling. Applicable standard requires that prior to such warrantless home entry there exist a true exigency justifying police entry onto McGuire curtilage and into first room of our house--BEFORE initially confronting Mrs. McGuire inside the second room. The officers' concocted story that they were innocently going from room to room knocking on doors to get a response from home's occupants should send off warning bells to all who are concerned with protecting personal privacy of our citizenry. The district court failed to address the proper question of whether there existed objective facts before police home entry that someone inside was injured. As for district court's use of subjective standard and making erroneous finding that extraterritorial officers possessed official capacity at our home and had performed a "welfare check" inside the house--based solely on officer's state of mind, naive acceptance that police did an authorized welfare check to which one home occupant "resisted", is wrong, wrong, wrong. In re vindication for warrantless home entry to perform claimed welfare check, this spring it was held the test is objective as in United States v. Arch, 7 F.3d 1300, 1303-05 (7th Cir., 1993):

> ""However, a police officer's subjective belief that exigent circumstances exist is insufficient to make a warrantless search. Instead ... the test is

objective: "the government must establish that the circumstances as they appeared at the moment of entry would lead a reasonable, experienced law enforcement officer to believe that someone inside the house, apartment, or hotel room required immediate assistance.'" U.S. v. Richardson, 208 F.3d 626 (7th Cir., 2000). Richardson held officer's state of mind was irrelevant to determine legality of entry.

> "We adhere to our well-established rule that such a subjective belief cannot justify a warrantless entry. E.g. Arch, 7 F.3d at 1304. Using an objective standard ensures that there is some control on the reasonableness of police officers' behavior. This kind of external accountability is especially important when warrantless searches of homes are at stake", Richardson at 630.

We sufficiently stated and factually proved Respondent conduct violating our clearly established Constitutional rights to seek redress for governmental grievance (1st Amendment), of privacy (4th, 9th, and 14 Amendments), of due process (4th, 5th, 6th, 9th, and 14th Amendments), and of equal protection of the law (14th Amendment). Undisputed and stipulated facts prove our case for us.

Dirty Deal

The record reveals McGuires were exercising our 1st Amendment right to seek redress for government grievance of police misconduct at time Respondents made dirty deal offer to drop criminal resisting charge in exchange for entire McGuire family's waiver of civil liability for the 12/31/96 police misconduct. We had made written and oral complaints of the misconduct to several government officials

and agencies, having filed 4/28/98 Notice of Claim upon Rock Co. Sheriff Dept. and Rock County, and having suffered prolonged police harassment at our home, workplace harassment against Mr. McGuire for several months by coworkers affiliated with Village of Brooklyn after filing this action, refusal to drop the groundless criminal complaint-after Lorraine McGuire and James McGuire refused to waive civil liability for the police misconduct, O'Leary's harassment of Mrs. McGuire in issuing against her a criminal witness subpoena (under threat of fine and imprisonment) in clear absence of all jurisdiction-to testify at a nonexistent hearing. They violated Mr. McGuire's clearly established due process rights by trumping up a groundless "resisting" prosecution following illegal seizure of all three McGuires and subsequent formal arrest of one by officers clearly lacking arrest authority and acting in clear violation of federal law and constitutional prohibition in making nonconsentual nighttime warrantless entry into our curtilage and into our home--either to conduct the coercive investigation where Fell roughed up Mr. McGuire inside his Green County home while demanding he confess to having been a drunk driver hours earlier at time his car slid into a Rock County ditch or to conduct a purported "welfare check". Regardless, Respondents harassed our entire family while simultaneously refusing to drop bad faith prosecution for our refusal to give civil release of liability for 12/31/96 police wrongdoing inflicted on our family. Government misconduct punished all three Petitioners for Mr. McGuire's and his wife's refusal to waive civil liability on behalf of our

family for the police misconduct for which he was prosecuted for "resisting". Respondents deliberately and maliciously abridged these Petitioners clearly established rights and protracted the violations by, in "clear absence of all jurisdiction", taking actions not integral part of judicial process--acting without discretion--where all Respondents were expected to know they were not entitled to act in a judicial role--and under circumstances which should have known that their conduct would violate our legal rights and cause forseeable injury. Welsh v. Wisconsin, 104 S.Ct. 2091 (1984) held government officers are prohibited from making nighttime warrantless entry into private dwelling when there is no objective exigency. Abandoned McGuire car in a ditch did not constitute an "accident", and because there was no property damage nor personal injury, we were not required by Wis. Stats. 347.70 to report to any police department that the car slid off an icy road patch into a Rock County ditch. Wisconsin state law mandates a trial court is deprived of personal jurisdiction over a defendant arrested in his home without an arrest warrant and absent exigent circumstance, under State ex re. Angela M.W. v. Kruzicki , 541 N.W. 2d 482 (Wis. App. Ct., 1995) (citing P.C. v CC., 161 Wis. 2d 277, 297, cert. denied, 112 S. Ct. 338 (1991).

Lack Of Official Capacity Of Police

Under de novo review standard, there is no reasonable basis for the pretrial finding that extraterritorial police acted pursuant to "implied" Green County mutual aid request. We argued to the 7th Circuit as to the utter lack of government record of the eight discrete Green County Sheriff

Dept. communications supposedly occurring to comprise an implied mutual aid request--and pointed out where Rock County records reveal Roberts' illegal complicity with the unauthorized Rock County "pursuit to investigate" outside their limited jurisdictions. Also, "implied request" doctrine is plainly inoperative in this case, given: [1] Green Co. Sheriff Dept. government records created in its usual and normal course of business contains omission of those numerous alleged police communications (under Fed. Rules of Evid. 803 (6,8) and 804 (7, 10) this is sufficient to disprove such request occurred). {Dkt. #207/p. 27, Green Co. Deputy Jenson testim.; Dkt. #3/Complnt. Exhibits 72, 73; Dkt. #108}, [2] Green Co. Sheriff Dept. lacked jurisdiction over the matter, having simply received Roberts unsolicited dispatch report of finding an abandoned car having no property damage sitting in Rock County ditch {Dkt. #108/ 9:25-9:31 p.m. dispatches} (Car was found wholly within Rock County borders--not on the width of the boundary highway nor even on road shoulder.), and [3] It is legally invalid for "requester" to make a mutual aid request to outside law enforcement agencies/officers to lend assistance as to a matter not occurring within requester's own jurisdiction. "Upon request of any law enforcement agency ...the law enforcement personnel of any other law enforcement agency may assist the requesting agency within the latter's jurisdiction, notwithstanding any other jurisdictional provision." Wis. Stats. 66.305. Because Green County was deficient jurisdiction at Rock County abandoned car scene, it did not extend official capacity of extraterritorial police beyond their limited juris-

dictions at/inside our Green County home. Lack of exigency deprived Respondent police of official capacity while acting outside their limited jurisdictions at and inside McGuires' residence. (Extrajurisdictional deputy who went outside his limited territorial jurisdiction to question citizen in another county was not performing duties for which he was employed to do.) State v. Barret, 96 Wis. 2d 174, 180 (Wis. Supreme Ct. 1980). Government officer engaging in personal frolic is not endowed with official capacity), United States v. Heliczer, 373 F.2d 241 (1967).

Judicial notice should have been taken of pretrial stipulation that police lacked objective indication anyone inside McGuire home needed medical assistance before making entry, and of Fell's and Roberts' testimonies as to having crossed threshold and entered the first room without our knowledge or permission. Apart from the issue of absence of official capacity, Respondents stipulatedions proves it was unreasonable for police to covertly enter our home to force on us a nonexigent so-called "welfare check".

Shocking Lack of All Sense of Proportion

Objective facts do not indicate after-the-fact "consent", nor personal injury, nor property damage nor criminal conduct nor even that a collision had occurred--no operative exigency or compelling need for extrajurisdictional police to justify nighttime warrantless entry into our rural home. We agree with Supreme Court ruling that each tenant of a building has a constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry, pursuant to MacDonald ruling (335

U.S. at 458).

"'Even if one were to conclude that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case. This method of law enforcement displays a shocking lack of all sense of proportion.' ...'It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it.'" McDonald v. United States, 69 S. Ct. 191 (1948), 335 U.S. 451 at 459.

Conclusion

We ask this Supreme Court to grant our petition for writ of certiorari, not only for our benefit, but for the good of this society's private citizenry who wish to sleep secure in their homes and not endure unreigned police interference. We believe we are entitled to declaratory and injunctive relief this Court can give, and remand upon reversal of 7th Circuit mandate for subsequent trial on damages. We also assert the district court abused its discretion in awarding Respondents attorney fees to be paid by us, since we made proper good faith claims and the Respondent police themselves admitted to doing the actual complained-of conduct--but the district court refused to concede our privacy/due process/and equal protection of of law rights existed within our private curtilage and in home's first room , in face of stipulated lack of exigency.

James T. McGuire Lorraine C. McGuire

James McGuire, Lorraine McGuire, and On Behalf of Marital Minor Child

APPENDIX A

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 7, 2000*
Decided April 12, 2000

BEFORE
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge

No. 99-1176

the JAMES McGUIRE, et. al,

Plaintiffs-Appellants

v.

ROCK COUNTY BOARD OF SUPERVISORS, et. al,

Defendant-Appellees

Appeal from United States District Court for the Western District of Wisconsin

No. 98 C 414

John C. Shabaz, Chief Judge

ORDER

After finding an unoccupied vehicle in a ditch on the side of a highway, Rock County Wisconsin Deputy Sheriff Curtis Fell went to the home of the registered owner, James McGuire , to make sure no one had been hurt in the accident. Fell found Mr. McGuire at home asleep in the company of his wife and child. When awakened, Mr. McGuire became belligerent and Deputy Fell

arrested him for resisting an officer for which McGuire spent the night in jail. The criminal charges were later dropped, but the McGuires filed this civil rights action 42 U.S.C. Section 1983 for the harms they suffered during this event. Having been unsuccessful in the district court, the McGuires now appeal.

Because the claim against Deputy Fell was rejected by the jury after a trial, we must present the facts in the light most favorable to the verdict. Responding to a request from the Green County Sheriff's Department on the evening of December 31, 1996, Deputy Fell found a vehicle registered to James McGuire in the ditch of County Trunk Highway T. There was an empty child's car seat in the back. Fell learned that the McGuire lived near the scene of the accident and, concerned that the driver and possibly a child had been injured, went to their house to make sure no one was hurt. When Fell arrived at the McGuires', Lorraine McGuire opened the door and permitted Fell to enter the house. She informed Fell that her husband was the driver, that he had been drinking, and directed Fell to the dining room where Mr. McGuire was passed out face-down on the floor. Fell made sure Mr. McGuire was breathing and attempted to wake him. Eventually, Mr. McGuire awoke and attempted to pick up his baby girl. Mrs. McGuire, holding the child, retreated from Mr. McGuire, telling him that he was intoxicated and in no condition to hold

* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. See Fed. R. App. P. App. P. 34(a)(2).

her. Because Mr. McGuire appeared intoxicated and was in no shape to hold a baby safely, Fell stepped in to prevent Mr. McGuire from holding the child. Mr. McGuire fought Fell's attempt to restrain him, so Fell arrested him and charged him with resisting an officer. Mr. McGuire was taken to the Rock County ail where he was detained until later in the morning of January 1, 1997. The charge of resisting an officer, as well as a traffic citation issued to Mr. McGuire for the auto accident, were later dismissed because they had been brought in the wrong jurisdiction.

James McGuire, Lorraine McGuire and their minor child then brought this suit under 42 U.S.C. Section 1983 against twenty-one county and municipal defendants who the McGuires claim violated their civil rights. Specifically, the McGuires allege that Deputy Fell engaged in an unreasonable search and seizure and used unnecessary force when he entered the McGuire residence and arrested James McGuire on December 31, 1996. The McGuires also allege that twelve Rock County law enforcement officials, including the County itself (the "County defendants"), a Village of Brooklyn police officer, the Village of Brooklyn Police Department, and the Village of Brooklyn itself (the "Village defendants"), and four members of County District Attorney's Offices and a County Circuit Court Judge (the "State defendants") violated the family's civil rights by inciting the arrest by Deputy Fell and then criminally prosecuting James McGuire for resisting. The district court dismissed the State defendants, granted summary judgment in favor of the Village defendants, and granted summary judgment for all of the County defendants except

Deputy Fell. A trial before a jury was held on whether Deputy Fell had received Lorraine McGuire's consent to enter the family's home and whether he had used excessive force in arresting James McGuire. The jury, after deliberating for fifteen minutes, answered "no" to both questions. The district court then entered judgment in favor of all the defendants and ordered the McGuires to bear the defendants' costs and reasonable attorney's fees. The McGuires now appeal.

Although the McGuires advanced at least nine "Issues for Judicial Review" in their appeal brief, they offered supporting argument for only three. First, the McGuires argue that the facts presented at trial show, contrary to the jury's verdict, that Fell entered their home without permission and used excessive force in arresting Mr. McGuire in violation of the Fourth Amendment. They recognize, however, that the evidence at trial regarding Deputy Fell's actions consisted almost entirely of conflicting testimony from the McGuires and Deputy Fell. The jury chose to credit Fell's testimony over the McGuires'. As we have previously stated, "we will not second-guess a jury on credibility issues...[I]t is not the task of this appellate court to reconsider the evidence or assess the credibility of the witnesses." United States v. Hickok, 77 F.3d 992, 1006 (7th Cir. 1996) (citations and quotations omitted). Accordingly, the jury's decision to discredit the McGuires' testimony must stand.

Second, the McGuires argue that the district court abused its discretion in making its evidentiary rulings. But their brief makes no legal argument why the district court rulings were erroneous, and

they do not cite to any legal authority in support of this claim. Federal Rule of Appellate Procedure 28(a)(9)(A) requires that an appellant's brief contain a legal argument supported by citations to legal authority and the record. Although the McGuires are proceeding without the assistance of counsel, even pro se litigants must include legal argument and cite supporting authority in their briefs. See Mathis v. New York Life Ins. Co., 133 F.3d 546, 548 (7th Cir. 1998) (per curiam), United States ex rel. Verdone v. Circuit Court for Taylor County, 73 F.3d 669, 673 (7th Cir. 1995) (per curiam). Because they have not done so, the McGuires have waived appellate review of this claim.

Finally, the McGuires argue that the County Circuit Court judge is not entitled to immunity because he did not have jurisdiction over the prosecution of Mr. McGuire "for lack of jurisdiction." Clearly, the McGuires are misinterpreting the term "jurisdiction" as the Supreme Court used it. The Court in Pierson referred to the "immunity of judges for acts within the judicial role," id., not to their actions in dismissing a case over which they maintained no legal jurisdiction.

Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 23, 2000

BEFORE

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge

No. 99-1176

JAMES McGUIRE, et. al,
Plaintiffs-Appellants

v.

ROCK COUNTY BOARD OF SUPERVISORS, et. al,
Defendant-Appellees

Appeal from the United States District Court for Western District of Wisconsin

No. 98 C 414

John C. Shabaz, Chief Judge

ORDER

Plaintiffs-Appellants filed a petition for rehearing and petition for rehearing en banc on April 26, 2000. No judge in regular service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition is therefore DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WISCONSIN

JAMES MCGUIRE, LORRAINE MCGUIRE
and MINOR CHILD MCGUIRE,
Plaintiffs ORDER
Case No.: 98-C-414-S

v.

ROCK COUNTY BOARD OF SUPERVISORS, HOWARD L. ERICKSON, JAMES DILLEY, CURTIS N. FELL, ARTHUR R. LEFEBER, THOMAS W. GEHL, FRANK D. DUBANOWICH, VILLAGE OF BROOKLYN POLICE DEPARTMENT, BILL ROBERTS, DAVID JOHN O'LEARY, THOMAS G. WHITE, STEPHEN CARPENTER, THOMAS A. SCHROEDER, CHARLES A. HOLZNECHT, RICHARD T. WERNER, CRAIG KNUTSON, TERRY G. MAYBEE, DEAN A. CORNFORD, GARY L. LUHMAN, ROCK COUNTY and VILLAGE OF BROOKLYN,
Defendants,

Upon receipt of the special verdict in the above entitled matter the Court determined that the plaintiffs' claims were based on their perjured testimony as well as the fraudulent strategy which they continued to devise and pursue throughout trial. Not only were their claims frivolous and less than substantial but were based on false statements presented during the pre-trial proceedings and untruthful testimony provided to the jury during trial.

Accordingly,

Copy of this document has been mailed to the following: all parties on

record this 27th day of Nov., 1998, By s/_____ Secretary to Judge John C. Shabaz

ORDER

IT IS ORDERED that judgment be entered in favor of defendant against plaintiffs dismissing their complaint with prejudice, costs, and reasonable attorney fees.

IT IS FURTHER ORDERED that the defendants may provide an itemization of those reasonable attorney fees and the justification therefore pursuant to Rule 54, Federal Rules of Civil Procedure; plaintiffs are provided from the receipt of any response to reply.

Entered this 25th day of November, 1998.

BY THE COURT

s/_____
John C. Shabaz
District Judge

APPENDIX D

Docket #202

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

AMENDED
JUDGMENT IN A CIVIL CASE

JAMES MCGUIRE, LORRAINE MCGUIRE AMENDENOR CHILD MCGUIRE,
Plaintiffs

Case No.: 98-C-414-S

v.

ROCK COUNTY BOARD OF SUPERVISORS, HOWARD L. ERICKSON, JAMES DILLEY, CURTIS N. FELL, ARTHUR R. LEFEBER, THOMAS W. GEHL, FRANK D. DUBANOWICH, VILLAGE OF BROOKLYN POLICE DEPARTMENT, BILL ROBERTS, DAVID JOHN O'LEARY, THOMAS G. WHITE, STEPHEN CARPENTER, THOMAS A. SCHROEDER, CHARLES A. HOLZNECHT, RICHARD T. WERNER, CRAIG KNUTSON, TERRY G. MAYBEE, DEAN A. CORNFORD, GARY L. LUHMAN, ROCK COUNTY and VILLAGE OF BROOKLYN,
Defendants,

This action came before the court and a jury with DISTRICT JUDGE JOHN C. SHABAZ presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

---

that judgment entered November 27, 1998 is affirmed and amended as follows:

IT IS FURTHER ORDERED that defendants Village of Brooklyn, Village of Brooklyn Police and Bill Roberts are AWARDED attorney fees and costs in the amount of

$5,899.81

IT IS FURTHER ORDERED that defendants Rock County Board of Superviisors, Howard L. Erickson, James Dilley, Curtis N. Fell, Arthur R. LeFeber, Thomas W. Gehl, Frank D. Dubanowich, Thomas A. Schroeder, Charles A. Holznecht, Craiig Knutson, Terry G. Maybee, Dean A. Cornford and Rock County are AWARDED attorney fees and costs in the amount of $12,421.64.

Approved as to form this 14th day of January, 1999.

s/_____
JOHN C. SHABAZ
DISTRICT JUDGE

s/_____
Joseph W. Skupniewitz, Clerk

_____ Jan 15, 1999
by Deputy Clerk s/_____ Date

IN THE UNITED STATES DISTRICT COURT
FOR WESTER DISTRICT OF WISCONSIN

JAMES MCGUIRE, LORRAINE MCGUIRE and MINOR CHILD MCGUIRE,

Plaintiffs

ORDER

v. 98-C-414-S

ROCK COUNTY BOARD OF SUPERVISORS, HOWARD L. ERICKSON, ROCK COUNTY SHERIFF, JAMES DILLEY, ROCK COUNTY SHERIFF DEPARTMENT LIEUTENANT, CURTIS N. FELL, ROCK COUNTY SHERIFF'S DEPARTMENT LAW ENFORCEMENT DIVISION COMMANDER, THOMAS W. GEHL, ROCK COUNTY SHERIFF'S DEPARTMENT LIEUTENANT, FRANK D. DUBANOWICH, ROCK COUNTY DEPUTY SHERIFF/COURT OFFICER, VILLAGE OF BROOKLYN POLICE DEPARTMENT, BILL ROBERTS, VILLAGE OF BROOKLYN POLICE OFFICER, THOMAS A. SCHROEDER, CORPORATION COUNSEL FOR ROCK COUNTY, CHARLES A. HOLZNECHT, ROCK COUNTY FAMILY COURT COMMISSIONER, CRAIG KNUTSON, ROCK COUNTY BOARD ADMINISTRATOR, TERRY G. MAYBEE, ROCK COUNTY BOARD CHAIRMAN and DEAN A. CORNFORD , ROCK COUNTY BOARD CHAIRMAN of PUBLIC SAFETY and JUSTICE COMMITTEE,

Defendants.

On November 27, 1998 after receipt of the special verdict in the above entitled matter judgment was entered in favor of plaintiffs against defendants dismissing their complaint and all claims contained therein with prejudice, costs and reasonable attorney fees. Plaintiffs move to overturn the judgment. This motion has been fully briefed and is ready for decision. Also ripe for decision is the determination of the award of costs and

attorney fees.

Plaintiffs argue that the judgment awarding costs and attorney fees should be overturned because they brought this action in good faith. Pursuant to 42 U.S.C. Section 1988 the Court in its discretion may award the prevailing party reasonable attorney fees and costs. When a defendant prevails in a civil rights action he or she must establish that plaintiffs' claim was frivolous, unreasonable or groundless. Tabrizi v. Village of Glen Ellyn, 833 F.2d 587, 594 (7th Cir. 1989). Costs are awarded to the prevailing party pursuant to Rule 54(d)(1), Federal Rules of Civil Procedure.

The Court made a finding after trial that plaintiffs' claims were frivolous, less that substantial and based on false statements and untruthful testimony. Plaintiffs have submitted no evidence or argument that persuade this Court that its finding was erroneous. Accordingly, plaintiffs' motion to overturn the judgment awarding defendants costs and attorney fees will be denied.

Itemization of attorney fees and costs has been provided by counsel for the Village of Brooklyn defendants as well as the Rock County defendants. The Village of Brooklyn defendants request $8,622.00 (95.8 hours at $90.00 an hour) in attorney fees and $513.00 in costs. The Rock County defendants request $23,505.00 (9.5 hours at $90.00 and hour and 226.5 hours at $100.00 an hour) in attorney fees and $1,421.64 in costs. Plaintiffs have filed their objections to the itemizations. Defendants have not replied to plaintiffs' specific objections.

The starting point for determing the amount of reasonable attorney fees to be awarded is the number of hours reasonably

expended on the litigation multiplied by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 433 (1982). The reasonable hourly rate that is to be usedin calculating the lodestar must be based on the market rate. Eddleman v. Switchcraft, Inc., 965 F.2d 422, 424 (7th Cir. 1992). The rates submitted by a party moving for attorney fees are presumptively reasonable. Gusman v. Unisys, Corp., 986 F.2d 1146, 1150 (7th Cir. 1993).

Plaintiffs argue that the hourly rate requested by attorneys for the defandants is too large becuase they are public sector attorneys. A reasonable hourly rate is based on the market rate. Hourly rates of $90.00 and $100.00 are reasonable based on the market rate in the Western District of Wisconsin.

Plaintiffs object to attorney fees claimed by Attorney Clausen for travel time. These fees are reasonable and will be allowed. Plaintiffs object to 35.95 of Attorney Clausen's hours as excessive. The Court will disallow these fees. The Village of Brooklyn defendants will be award $5,385.50 (59.85 hours at $90.00 per hour) in attorney fees. Their requested costs of $513.31 are reasonable and will be awarded them.

Plaintiffs specifically object to the reasonableness of all the attorney fees for Charmian Klys and to all but 77.75 of Attorney Schroeder's hours as excessive. The Rock County defendants do not reply to these specific objections but assert that all the hours were reasonable and necessary. A review of the record indicates that 111 of Attorney Schroeder's hours were necessary and reasonable. The Rock County defendatns will be awarded $11,000.00 (111 hours at $100.00 an hour). Their requested costs of $1,421.64 are

reasonable and will be awarded.

ORDER

IT IS ORDERED that plaintiffs' motion to overturn the judgment is DENIED.

IT IS FURTHER ORDERED that defendants Village of Brooklyn, Village of Brooklyn Police Department and Bill Roberts are AWARDED attorney fees and costs in the amount of $5,899.81.

IT IS FURTHER ORDERED tht defendants Rock County Board of Supervisors, Howard L. Erickson, James Dilley, Curtis N. Fell, Arthur R. LeFeber, Thomas W. Gehl, Frank D. Dubanowch, Thomas A. Schroeder, Charles A. Holznecht, Craig Knutson, Terry G. Maybee, Dean A. Cornford and Rock County are AWARDED attorney fees and costs in the amount of $12,421.64.

IT IS FURTHER ORDERED that judgment be AMENDED accordingly.

Entered this 14th day of January, 1999.

BY THE COURT:

s/_____
John C. Shabaz
District Judge

(2)

No. 00-640

Supreme Court, U.S.
FILED
NOV 21 2000
CLERK

In The

Supreme Court of the United States

JAMES MCGUIRE, LORRAINE MCGUIRE and MARITAL CHILD MCGUIRE,

Petitioners,

v.

ROCK COUNTY, ROCK COUNTY BOARD OF SUPERVISORS, VILLAGE OF BROOKLYN, VILLAGE OF BROOKLYN POLICE DEPARTMENT, DEAN A. CORNFORD, TERRY G. MAYBEE, THOMAS A. SCHROEDER, CRAIG KNUTSON, CHARLES A. HOLZNECHT, HOWARD L. ERICKSON, JAMES A. DILLEY, CURTIS N. FELL, FRANK D. DUBANOWICH, THOMAS W. GEHL, ARTHUR R. LEFEBER, WILLIAM ROBERTS, DAVID JON O'LEARY, THOMAS G. WHITE, STEPHEN CARPENTER, GARY L. LUHMAN, RICHARD T. WERNER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS A. SCHROEDER
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ROCK COUNTY CORPORATION COUNSEL
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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

The McGuires' "Fair Statement of Undisputed and Stipulated Fact" (pp. 1-9 of Petition for Writ of Certiorari) is anything but "fair." Their Petition misstates or ignores critical facts found by the lower courts, as well as the District Court jury. The facts, supported by the record herein, reveal the following.

This case is a *pro se* action involving a Complaint against the Rock County Sheriff (Erickson), a Lieutenant in the Sheriff's Department (Dilley), the Commander of the Law Enforcement Division of the Rock County Sheriff's Department (LeFeber), a patrol Deputy Sheriff (Fell), the head of the Detective Bureau of the Rock County Sheriff's Department (Gehl), a Deputy Sheriff serving as Court Officer (Dubanowich), the Rock County Corporation Counsel (Schroeder), a Rock County Court Commissioner (Holznecht), the Rock County Administrator (Knutson), the Chair of the Rock County Board of Supervisors (Maybee), the Chair of the Rock County Board's Public Safety and Justice Committee (Cornford), the Rock County Board of Supervisors, and the County of Rock (hereinafter collectively referred to as "County defendants"). The Complaint was filed by James McGuire, Lorraine McGuire and their minor marital child, who reside in the Town of Brooklyn, County of Green, State of Wisconsin (hereinafter collectively referred to as "the McGuires").

The Complaint alleged that the McGuires' constitutional rights were violated when Fell entered the McGuire residence on December 31, 1996, used unnecessary force and arrested James McGuire, as well as by taking James

McGuire to the Rock County Jail and during the subsequent criminal prosecution. The McGuires' Complaint was also filed against a Village of Brooklyn Police Officer (Roberts), the Village of Brooklyn Police Department and the Village of Brooklyn (hereinafter collectively referred to as "Village defendants"), as well as against a Circuit Court Judge (Werner), the Rock County District Attorney (O'Leary), the Green County District Attorney (Luhman) and two Rock County Assistant District Attorneys (White and Carpenter) (hereinafter collectively referred to as "State defendants").

Fell was on patrol duty during the evening hours of December 31, 1996, New Year's Eve. The Green County Sheriff's Department requested a response by the Rock County Sheriff's Department to an auto accident on County Trunk Highway T (CTH T). CTH T forms a boundary between Rock County and Green County. At about 9:36 p.m. on that date, Fell responded to the scene and found a vehicle in the ditch on the Rock County side of CTH T with an empty child's car seat in the back seat of the vehicle. In checking with dispatch, Fell discovered that the owner of the vehicle, James McGuire, lived nearby. Needing to continue his investigation and concerned for the safety and welfare of any occupants of the vehicle, Fell proceeded to the McGuire residence which was on the Green County side of CTH T, less than 1/4 mile from the Rock County line.

Fell was in uniform and easily identifiable as a Rock County Deputy Sheriff. Lorraine McGuire consented to Deputy Fell's entrance into the McGuire residence. Upon entrance into the residence, Fell discovered James McGuire on the floor. Mrs. McGuire informed Fell that

her husband was intoxicated, had been throwing up earlier and passed out on the floor. Although initially unable to awaken Mr. McGuire, Deputy Fell was ultimately able to speak with him. Mr. McGuire stated that he wanted to hold his baby daughter. Mrs. McGuire, holding the child, retreated from Mr. McGuire, telling him that he was intoxicated and in no condition to hold the baby. Because Mr. McGuire appeared intoxicated and was in no shape to hold a baby safely, Deputy Fell intervened to prevent Mr. McGuire from holding the child. Mr. McGuire fought Fell's attempt to restrain him, so Fell arrested him and charged him with resisting an officer.

Officer Roberts had also been dispatched to the accident scene on CTH T. While waiting at the scene, Roberts was requested to go to the McGuire residence to check on the welfare of Deputy Fell. Upon his arrival, Roberts was advised that Fell had arrested James McGuire for resisting an officer.

Fell telephoned Lt. Dilley who advised him to bring James McGuire to the Rock County Jail for booking and release. Mr. McGuire was transported to the Rock County Jail where he was detained until later in the morning of January 1, 1997. Mr. McGuire was also issued a citation for driving too fast for conditions.

On February 3, 1997, Dubanowich signed a criminal complaint against James McGuire for resisting an officer in Rock County Case No. 97-CM-222J. The criminal complaint erroneously stated that the offense had occurred in Rock County. James McGuire appeared before Commissioner Holznecht on February 3, 1997 and probable cause was found that Mr. McGuire had committed the offense

of resisting an officer. McGuire pled not guilty. On June 4, 1997, Judge Werner dismissed the criminal complaint ruling that it should have been issued by the Green County District Attorney. White and Carpenter made court appearances on behalf of the State in the criminal proceedings against James McGuire.

Lorraine McGuire complained about the handling of this incident to Luhman, the Rock County Sheriff's Department, Maybee and Cornford. Mrs. McGuire was not satisfied with the efforts of Erickson, LeFeber and Gehl in investigating her complaint. Schroeder responded to Mrs. McGuire on behalf of Maybee and Cornford.

The McGuires began this litigation with the filing of a Summons and Complaint on or about June 12, 1998. An Amended Summons and Complaint was filed on or about July 6, 1998.

A Motion to Dismiss State defendants O'Leary, White, Carpenter and Luhman was filed on July 15, 1998. A Motion to Dismiss State defendant Werner was filed on July 20, 1998. An Order granting both those motions and dismissing State defendants was entered by the United States District Court for the Western District of Wisconsin (Hon. John C. Shabaz) on September 8, 1998.

On October 5, 1998, County defendants filed a Motion for Summary Judgment which, except for Deputy Fell, was granted in an Order entered November 9, 1998. Village defendants were also dismissed on a separate Motion for Summary Judgment.

A trial to a jury was held on November 23, and 24, 1998 on whether Fell entered the McGuire residence on

December 31, 1996 without consent and on whether Fell used excessive force during the course of the arrest of James McGuire on that same date. Both issues were decided favorably to Deputy Fell. In an Order dated November 25, 1998 the District Court ordered judgment to be entered in favor of all defendants with prejudice and with costs and reasonable attorney's fees.

The McGuires proceeded with an appeal to the United States Court of Appeals for the Seventh Circuit. In a decision issued April 12, 2000 (Appendix A to Petition for Writ of Certiorari) the judgment of the District Court was affirmed.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE PETITION MISSTATES OR IGNORES CRITICAL FACTS DETERMINED IN THE LOWER COURTS.

A. Mrs. McGuire consented to Deputy Fell's entry into the McGuire residence on December 31, 1996.

Of the 12 issues set forth by the McGuires in their Petition for Writ of Certiorari at least seven of them (1, 2, 5, 6, first 7, 8 and 9) revolve entirely around the McGuires' characterization of Fell's entry into their residence as a warrantless, nonexigent entry. The McGuires then spend the majority of their argument citing case law relative to such warrantless, nonexigent entries. Such

characterization of the issues and the argument are irrelevant as it totally ignores the jury's determination that Mrs. McGuire consented to Deputy Fell's entry.

> Generally, the jury and not the appellate court determines the facts of the case and the appellate court cannot invade the province of the jury in this respect or substitute its judgment of the facts for that of the jury.

5 C.J.S. § 784 (1993 ed.). This was clearly recognized by the 7th Circuit Court of Appeals in its determination that "we must present the facts in the light most favorable to the verdict." (Appendix A to Petition for Writ of Certiorari).

The jury was able to reach its determination on this and another factual issue within 15 minutes after hearing trial testimony and argument over a two day period. Insight into the McGuires' prosecution of this appeal can be garnered from the Order entered by the United States District Court for the Western District of Wisconsin (Hon. John C. Shabaz) on November 25, 1998 which contains the following extraordinary statement:

> Upon receipt of the special verdict in the above entitled matter the Court determined that the plaintiffs' claims were based on their perjured testimony as well as the fraudulent strategy which they continued to devise and pursue throughout trial. Not only were their claims frivolous and less than substantial but were based on false statements presented during the pre-trial proceedings and untruthful testimony provided to the jury during trial.

(Appendix C to Petition for Writ of Certiorari).

The McGuires' attempt to seize on Fell's lack of any specific memory concerning the outside doorbell is an effort to create a coercive situation from which voluntary consent could not be given. This attempt is made with the McGuires' version of out-of-context snippets of testimony, in the absence of an official transcript. From Fell's lack of memory the McGuires argue that Fell ignored the doorbell, stormed across their enclosed porch waking Mrs. McGuire and confronted her at the kitchen door thus "depriv[ing] her of ability to give informed consent. . . . " (page 14 of Petition for Writ of Certiorari).

It is instructive to note that the record below (Docket Entry #89) contains Mrs. McGuire's Affidavit, dated October 8, 1998 which, contrary to the argument in the Petition, states at paragraph 8:

> On December 31, 1996 I was awakened by the sound of our dog barking and then the sound of a doorbell ringing. . . . I looked out through a small window of Door #2, from inside my kitchen, and saw a man's head outside Door #1, with a distance of at least 13 feet between myself and the darkened outdoors outside the door where he was standing. . . . Because I only saw Curtis Fell's head (he was wearing no hat), he had to have been standing on one of the lower cement steps or at the bottom of the steps on the sidewalk just before the steps. . . . Except for his continuing to ring the doorbell, I couldn't hear anything else due to my dog jumping about and barking. . . .

The jury heard the testimony in this case and determined the credibility of the various witnesses. The jury was explicitly instructed that in determining "whether consent exists [to Fell's entry into the McGuire residence]

you should examine all the surrounding circumstances." (R-App.1) Based on the testimony, its credibility assessments and the Judge's instructions the jury concluded that Mrs. McGuire consented to Deputy Fell's entry into the McGuire residence on December 31, 1996.

B. Deputy Fell did not use excessive force during the arrest of James McGuire on December 31, 1996.

As with the issue of consent, the McGuires offer no basis to review the jury's determination relative to lack of excessive force other than their disagreement with it. Again, that determination is within the province of the jury. Again, based on the testimony, its credibility assessments and the Judge's instructions (R-App. 2) the jury concluded that Deputy Fell did not use excessive force during the arrest of James McGuire on December 31, 1996.

II. THE PETITION ARGUES THE MISAPPLICATION OF THE LAW BY THE LOWER COURTS.

A. Wisconsin's "mutual assistance law" provided authorization for Deputy Fell's arrest of James McGuire on December 31, 1996.

Section 66.305(1), Wis. Stats., provides, in pertinent part, as follows:

> Upon request of any law enforcement agency, including county law enforcement agencies as provided in s. 59.28(2), the law enforcement personnel of any other law enforcement

> agency may assist the requesting agency within the latter's jurisdiction, notwithstanding any other jurisdictional provision.

Section 59.28(2), Wis. Stats., states that "County law enforcement agencies may request the assistance of law enforcement personnel or may assist other law enforcement agencies as provided is ss. 66.305 and 66.315."

Deputy Fell was acting pursuant to § 66.305(1), Wis. Stats., when he went into Green County to investigate the accident. Having responded to such a request, Deputy Fell had the authority, pursuant to § 66.305(1) to make an arrest for a crime committed in his presence. *United States v. Mattes*, 687 F.2d 1039, 1041 (7th Cir. 1982). The District Court's finding in this regard was correct.

B. Summary judgment was appropriately ordered by the District Court for all County defendants with the exception of Deputy Fell.

While it is unclear whether the McGuires are challenging the granting of the Motion for Summary Judgment as to County defendants (except Fell), it is apparent that any such argument would be based on the McGuires' position that the District Court misapplied a properly stated rule of law. The Court of Appeals recognized the McGuires offered no supporting argument in this regard. (Appendix A to Petition for Writ of Certiorari).

It is submitted that the properly stated rule of law was applied correctly and summary judgment was appropriately granted to County defendants (except Fell).

III. THE PRIMARY BASIS FOR THE MCGUIRES' PETITION IS THAT THE LOWER COURTS MADE ERRONEOUS FACTUAL FINDINGS AND MISAPPLIED THE LAW.

Rule 10 of the Rules of the Supreme Court of the United States concludes with the statement: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law." According to Justice Holmes, the Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). This policy is applied with "particular vigor when the district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles v. Whitley*, 514 U.S. 419, 456-57 (1995) (Scalia, J., Dissenting). See also *NLRB v. Hendricks County Rural Electric Membership Corporation*, 454 U.S. 170, 176 (1981).

Under this standard, the McGuires' Petition should be denied.

IV. ISSUE 10 SET FORTH IN THE PETITION RELATIVE TO FAILURE TO PROVIDE MIRANDA RIGHTS IS NOT PROPERLY BEFORE THIS COURT.

Question 10, as set forth in the McGuires' Petition for Writ of Certiorari asks whether a failure to inform Petitioners of their Miranda rights violated their 5th Amendment rights. As this issue was not raised in the Court of Appeals, it is not properly before this Court.

V. THE LACK OF A TRANSCRIPT OF THE DISTRICT COURT PROCEEDINGS PROHIBITS REVIEW

Rule 10(b)(2) of the Federal Rules of Appellate Procedure states:

> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to the finding or conclusion.

As is the case here, transcripts of certain proceedings are necessary to a resolution of the issues on appeal. "It is obvious that an appellate court has no alternative but to dismiss an appeal if the absence of a transcript precludes meaningful review." *Fisher v. Krajewski*, 873 F.2d 1057, 1061 (7th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990). See also *Woods v. Thieret*, 5 F.3d 244, 245 (7th Cir. 1993); *Birchler v. Gehl Company*, 88 F.3d 518, 520 (7th Cir. 1996).

CONCLUSION

For the forgoing reasons, the Petition for Writ of Certiorari should be denied.

Dated this 21st day of November, 2000.

Respectfully submitted,

THOMAS A. SCHROEDER
Rock County Corporation Counsel
51 S. Main Street
Janesville, WI 53545
(608) 757-5530
Attorney for County Respondents

FOURTH AMENDMENT

Plaintiffs assert that defendant Curtis Fell deprived them of the right to be free from unreasonable searches as guaranteed under the Fourth Amendment to the Constitution of the United States. The entry of defendant Curtis Fell into plaintiffs' home did not violate their Fourth Amendment rights if it was pursuant to plaintiff Lorraine McGuire's consent.

Consent may be express or implied. Express consent exists when a person expressly authorizes or invites another into his or her home. Implied consent exists when a person by his or her words, gestures or conduct consents by implication to another person's entry into the home. To determine whether consent exists you should examine all the surrounding circumstances.

FOURTH AMENDMENT – EXCESSIVE FORCE

Plaintiff James McGuire claims that defendant Curtis Fell deprived him of the right to be free from unreasonable seizures as guaranteed under the Fourth Amendment to the Constitution of the United States and must prove by the preponderance of the evidence that defendant Curtis Fell used excessive force during the course of his arrest.

In making a lawful arrest a police officer has the right to use such force as is reasonably necessary under the circumstances of each particular case to effect the arrest, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others and whether he is actively resisting arrest or attempting to evade arrest by flight.

Whether or not force used in making an arrest was excessive is an issue to be determined by you in light of all of the surrounding circumstances. The defendant officer has the lawful authority to use such force in making the arrest as reasonable police officers would believe necessary.

This reasonableness inquiry is an objective one; the question is whether the officer's actions are objectively reasonable in light of the facts and circumstance confronting them, without regard to their underlying intent or motivation.

Supreme Court, U.S.
FILED
NOV 22 2000
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(3)

No. 00-640

IN THE

Supreme Court of the United States

JAMES McGUIRE, *et al.*,

Petitioners,

v.

ROCK COUNTY BOARD OF SUPERVISORS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE BROOKLYN RESPONDENTS

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RESPONDENTS' BRIEF IN OPPOSITION

Background.[1]

The District Court for the Western District of Wisconsin granted the Village of Brooklyn, the Village of Brooklyn Police Department, and William Roberts, who is a Brooklyn police officer (the "Brooklyn respondents"), summary judgment, which the Seventh Circuit Court of Appeals affirmed. In between those rulings the district court conducted a jury trial on the petitioners' claims against Rock County Sheriff's Deputy Curtis Fell. Officer Roberts testified at that trial, but there is no official trial transcript.

The petitioners' claims against the Brooklyn respondents arise out of the activities of Officer Roberts on New Year's Eve, 1996, when he and Deputy Fell received the task of investigating a car in a rural ditch at a highway intersection on the border between Rock County and Green County, Wisconsin, within a mile of the petitioners' Green County home. The officers found no one in that car, which belonged to the petitioners. Deputy Fell then proceeded to the petitioners' home to inquire about the accident, while Officer Roberts waited with the car for the arrival of a tow truck. While waiting for the tow, Officer Roberts received a call from the Green County dispatcher, who explained that the Rock County Sheriff's Department could no longer contact its deputy. The Green County dispatcher asked Officer Roberts to go to the petitioners' home to check on the deputy. (Based on their reading of the Green County dispatcher's log, the petitioners dispute Officer Roberts' assertion that he received such a request.)

---

1. This history appears in affidavits constituting docket numbers 85, 86, 108, 138 and 139.

When Officer Roberts arrived at the petitioners' home the storm door at the top of the steps leading to the petitioners' unheated porch was not locked or secured. Officer Roberts did not notice any doorbell, walked across the porch, and knocked on the door leading from the porch to what turned out to be the petitioners' kitchen.

As soon as Officer Roberts knocked, one of the petitioners (Mrs. McGuire) opened the door. It was cold outside, and Officer Roberts stepped across the threshold long enough to ascertain that the deputy was alright. (The petitioners heard no knock, and assert that Mrs. McGuire opened the door at the instruction of Deputy Fell.)

When he entered the kitchen, Officer Roberts discovered that Deputy Fell had Mr. McGuire in custody. Mr. McGuire was in handcuffs, and Deputy Fell appeared to be somewhat out of breath. The deputy told Officer Roberts that he had arrested Mr. McGuire for "resisting." Before proceeding to the petitioners' home, Deputy Fell made no suggestion that he intended to make any arrest, and until Officer Roberts arrived at the petitioners' home, he was unaware of any arrest.

The petitioners assert that Deputy Fell told Officer Roberts to leave the house, but at no time did the petitioners themselves object to Officer Roberts' presence, and at no time did they tell him or ask him to leave. When Mrs. McGuire opened the door she did not block the doorway or give any indication, either verbal or physical, that she did not consent to Officer Roberts' entry.

Officer Roberts did step back outside in order to let the dispatcher know that Deputy Fell was okay. Then he

accompanied the deputy and Mr. McGuire from the petitioners' house to the deputy's car because the conditions were icy and Officer Roberts was concerned that Mr. McGuire, who remained in handcuffs, might fall.

Later that evening Officer Roberts returned to the petitioners' home and asked Mrs. McGuire for the keys to the petitioners' car. She gave him those keys without objection, and he delivered them to the tow truck driver, who then returned the car to Mrs. McGuire. Mrs. McGuire again gave no indication that she had any objection to Officer Roberts' presence at her home.

Officer Roberts did not request a prosecution of Mr. McGuire, nor did he become involved in Mr. McGuire's prosecution.

REASONS FOR DENYING THE WRIT

1. Mrs. McGuire consented to Officer Roberts' entry into the petitioners' home.

As the petitioners point out, Deputy Fell, like Officer Roberts, entered the petitioners' porch before he had any contact with the petitioners. The jury that heard the petitioners' claims against Deputy Fell determined that he did receive Mrs. McGuire's consent to enter their home, and that he did not use excessive force when he arrested Mr. McGuire, despite the petitioners' allegations that Deputy Fell had forced his way in, without permission, and also despite the petitioners' assertions that once inside their home Deputy Fell physically abused Mr. McGuire.

The petitioners assert that by entering their porch in order to knock on the door leading from that porch to the kitchen, Officer Roberts also violated the petitioners' Fourth Amendment privacy rights, but Officer Roberts entered that porch and knocked on the kitchen door only because he did not notice any doorbell in the vicinity of the storm door leading into the porch.

> Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's "castle" with the honest intention of asking questions of the occupant thereof -- whether the questioner be a pollster, a salesman, or an officer of the law.

Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964).[2] Deputy Fell and Officer Roberts did not arrive at high noon, but on the other hand the petitioners did leave their car in the ditch, on New Year's Eve, without bothering to notify the police, who then had to make their own investigation. Under the circumstances a visit from the authorities should have been no surprise.

Moreover, when Officer Roberts arrived and knocked on the kitchen door, it was opened to him, without opposition. The gesture of opening the door, and of permitting Officer Roberts to enter, without objection, constitutes consent to

2. Cf. the petitioners' suggestion, at pages 13, 15 and 16 of their petition, that it was illegal for the police even to enter the petitioners' yard.

enter. *United States v. Cotnam*, 88 F.3d 487 (7th Cir. 1996). "The Fourth Amendment prohibits the police from making a warrantless nonconsensual entry into a suspect's home in order to make a routine felony arrest or to conduct a search. . . . A person can, however, consent to the entry of their home or hotel, and consent need be neither express nor verbal." *Id.* at 495. (Mrs. McGuire's assertion that she heard no knock is irrelevant; for the purposes of her petition the question is whether her actions reasonably supported Officer Roberts' perception that she was allowing him into the house.) Officer Roberts made no demands of any sort, and departed shortly. His behavior in gaining admission to the petitioners' kitchen amounted to nothing more than actions countenanced everyday in polite society.

In opposition the petitioners cite *United States v. Dunn*, 480 U.S. 294 (1987), which concerned a warrantless view into a barn by police officers looking for controlled substances and for equipment and chemicals used in the production of controlled substances. The Supreme Court determined that the barn in question was not within the curtilage of the defendant's house, and therefore was not subject to the protections of the Fourth Amendment. In our case Officer Roberts was not conducting a warrantless search; he was merely knocking on the petitioners' door to inquire after Deputy Fell. His behavior was comparable to that of the officers involved in *Davis v. United States*, *supra*, at 303: "The uncontradicted evidence of the officers was that at the time they went to defendant's residence, it was not their intention to arrest the defendant nor to search the premises. They went there for the purpose of talking to Davis, whom none of them, apparently, had ever met before." Similarly it was not objectively unreasonable in our case for the police to travel to the petitioners' residence to ask what had become of the occupants of the petitioners' car.

At pages 13 and 14 of their petition the petitioners suggest that Mrs. McGuire was so "stunned" by the arrival of the police that she had no "ability to give informed consent or make voluntary waiver of constitutional rights of herself and of her family members, thereby negating the flawed jury verdict." Of course the fact of the matter is that the jury rejected the petitioners' claims that Deputy Fell had no consent to enter, and it is not the function of appellate courts to second-guess the jury on matters of credibility. *United States v. Hickok*, 77 F.3d 992, 1006 (7th Cir. 1996.) In pursuit of this theme the petitioners cite *United States v. Rosario*, 962 F.2d 733 (7th Cir. 1992), but in *Rosario* the appellate court ruled that even persons having apparent (as opposed to actual) authority over private premises may give the police effective consent to enter and search. Mrs. McGuire had both apparent and actual authority to admit the officers.

The petitioners also cite *Amos v. United States*, 255 U.S. 313 (1920), but *Amos* arose out of a situation in which a pair of revenuers, "without warrant, demand[ed] admission to make search of [private property] under government authority. . . ." *Id.* at 317. Speaking for the court, Justice Clarke explained that the government agents' admission to that property under those circumstances could not properly be considered consensual. Our situation is different for a couple of reasons. First, unlike the revenue officers in *Amos*, Officer Roberts never demanded admission to the petitioners' home. He knocked on the door, Mrs. McGuire opened it to him and allowed him to enter without objection, he stepped briefly into the kitchen, and then he left. The next time he approached Mrs. McGuire was to ask for the keys to the petitioners' car, and again Mrs. McGuire gave no indication that he lacked her consent to be on the property. Second, the *Amos* court suggested that whether a wife, in the absence of

her husband, can admit police officers into her home is an open question. In light of the concepts of apparent authority discussed in *Cotnam* and *Rosario*, *supra*, and in light of the abandonment of legal concepts of wifely subservience, any suggestion that Officer Roberts was not entitled to rely on Mrs. McGuire's behavior is ill-founded.

Johnson v. United States, 333 U.S. 10 (1948), cited at pages 11 and 23 of the petition, also concerned a situation in which law enforcement officers searched private living quarters, although they had no warrant and no consent. In *Johnson* a police officer informed the defendant that "I want you to consider yourself under arrest because we are going to search the room." *Id.* at 12. Officer Roberts made no such demands, and took no such action. Moreover, again in light of *Cotnam* and *Rosario*, *supra*, there is no merit to any suggestion that a police request for entry (without more) is by definition coercive simply because the person making the request is a police officer.

2. Officer Roberts had proper police authority in Green County

Section 66.305(1), Wis. Stats., provides that "[u]pon the request of any law enforcement agency . . . , the law enforcement personnel of any other law enforcement agency may assist the requesting agency within the latter's jurisdiction, notwithstanding any other jurisdictional provision." In our case — as Officer Roberts explained in his affidavits — the Green County Sheriff's Department asked Officer Roberts to investigate an accident that occurred on the border between Green County and Rock County. When he arrived at the accident scene, Officer Roberts found the petitioners' car in the ditch on the Rock County side of

the highway. Section 175.40(4), Wis. Stats., provides that a "peace officer whose boundary is a highway may enforce any law or ordinance that he or she is otherwise authorized to enforce by arrest or issuance of a citation on the entire width of such a highway and on the entire intersection of such a highway and a highway located in an adjacent jurisdiction." Under these rules Officer Roberts had proper police authority at the accident scene.

By virtue of section 66.305(1), Wis. Stats., Officer Roberts also possessed proper police authority when he arrived at the petitioners' Green County home because that trip fell reasonably within the scope of Green County's original request to investigate the accident (it is not unexpected that an officer would travel less than a mile to converse with the owner of a car abandoned under these circumstances), and because the Green County police subsequently asked him to go to that home. Such arrangements are not uncommon in rural areas of Wisconsin, where the ability to cross jurisdictional lines allows police agencies to share what in many instances is a very limited pool of help.

The petitioners seem to argue, on the strength of their interpretation of a Green County dispatcher's log and on the strength of the trial testimony of a Green County dispatcher (Jenson) who was not on duty at the time of the events underlying this suit, that Green County never asked Officer Roberts to follow up on Deputy Fell, and that Officer Roberts therefore never had any police authority at the petitioners' Green County home. However, neither that log nor Jenson's commentary on it requires a rejection of the affidavits Officer Roberts submitted in support of his motion for summary judgment, because the log does not include any transcript of

his conversations with the on-duty dispatcher. The log simply does not contradict Officer Roberts' explanation that Green County asked him to take certain actions in Green County, including a visit to the petitioners' home to see what had become of the deputy.

Moreover, as I point out elsewhere in this brief, even if Officer Roberts had no police authority beyond the Brooklyn village limits, he took no action at the petitioners' residence not permitted a private citizen.

3. Officer Roberts is entitled to a qualified immunity.

The qualified immunity I pled on Officer Roberts' behalf was probably unnecessary, because the petitioners' have not demonstrated that he somehow violated any of their civil rights, but in any event there is no indication that Officer Roberts was presented with a situation in which, under clearly settled law, he should have recognized that he was engaging in such violations.

As the Supreme Court explained in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), Officer Roberts is entitled to a dismissal, without trial, if his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The petitioners point out, in sweeping terms, that they enjoy various constitutional rights, including the right to privacy and a right to freedom from unreasonable searches. (The other rights invoked by the petitioners concern Mr. McGuire's arrest and prosecution, in which Officer Roberts had no involvement.) However, as Justice Scalia pointed out in *Anderson v. Creighton*, 483 U.S. 635 (1987), the petitioners cannot address the issue of clearly settled law

at an improperly high level of generality that transmutes the qualified-immunity doctrine into a "rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* at 640.

The proper questions in our case, insofar as Officer Roberts' qualified immunity is concerned, are necessarily more specific and can be fairly stated as follows:

1. Did clearly established constitutional law forbid him from traveling beyond the borders of the Village of Brooklyn?

2. Did clearly established constitutional law forbid him from crossing the petitioners' porch in order to knock on their door?

3. Did clearly established constitutional law forbid him from interpreting Mrs. McGuire's actions as consent to enter the petitioners' kitchen?

4. Did clearly established constitutional law forbid him from accompanying Mr. McGuire to the Rock County squad car in order to help prevent Mr. McGuire from slipping on the ice?

5. Did clearly established constitutional law forbid him from asking Mrs. McGuire for the keys to the petitioners' car so as to facilitate the removal of that car from a public ditch and the return of that car to the petitioners' home?

The petitioners would insist, on the basis of the dispatcher's log from the Green County Sheriff's

Department, that the answer to the first question is "yes" because, they tell us, that log demonstrates that Green County never requested Officer Roberts to do anything, and therefore he did not fall under the terms of the police mutual aid statute, sec. 66.305(1), Wis. Stats.

In actuality all that the petitioners have demonstrated is that the Green County dispatcher's log reflects contact between that dispatcher and Officer Roberts, but the log is cursory and incomplete. The affidavits of Officer Roberts and Rock County Lieutenant Dilley establish without contradiction that after Deputy Fell left the scene of the accident and proceeded to the petitioners' home, there did indeed come a point at which the Rock County Sheriff's Department could no longer reach him over the radio. Lieutenant Dilley became concerned about Deputy Fell's welfare, and asked the Rock County dispatcher to send another officer after Deputy Fell in order to see whether Deputy Fell was alright. Officer Roberts was not tuned to the Rock County frequency, but he did receive a request, via the Green County dispatcher, to go check on the deputy, and he honored that request. (Again, this history appears in the affidavits that constitute docket nos. 86, 138 and 139.) These facts are not changed because the Green County dispatcher failed to make complete notations in a radio log.

The mutual aid statute did confer police powers upon Officer Roberts at the petitioners' residence in Green County, beyond the borders of the Village of Brooklyn, but even if one were to conclude that the petitioners are somehow correct, and that while dealing with them Officer Roberts actually had no police power at all because he was outside his normal jurisdiction, the fact remains that he did nothing a private citizen could not properly do. Private citizens may travel to private homes and once there may knock on doors;

they may even enter when it appears they have consent to do so. In the absence of objection private citizens may help others traverse icy conditions, and may ask for car keys in order to assist in the extrication of cars from public ditches. The petitioners' arguments illustrate their misconception that Officer Roberts' status as a police officer somehow diminishes his freedom to travel and to make inquiries and take actions anyone else can make and take. *See, e.g., United States v. Benjamin*, 995 F.2d 756 (7th Cir. 1993), and *Davis v. United States*, *supra*.

The answer to each of the questions I have listed in this section is "no."

4. After Deputy Fell entered the petitioners' home, with Mrs. McGuire's consent, the petitioners had no legitimate expectation of privacy.

The jury found that Deputy Fell entered the petitioners' home with consent. For the duration of Deputy Fell's presence, including the time at which Officer Roberts arrived, the petitioners had no legitimate expectation of privacy. *Davis v. United States*, *supra*. The petitioners make no allegation that Officer Roberts made any greater intrusion than did Deputy Fell, or observed something that Deputy Fell did not observe, and of course the fact remains that Officer Roberts, also with Mrs. McGuire's apparent consent, did no more than briefly step across the kitchen threshold.

5. The Village of Brooklyn and its police department have no custom, practice or policy of engaging in illegal entries, false arrests or improper prosecution.

As Brooklyn Chief of Police Geske points out in his affidavit of October 5, 1998 (docket no. 85), the Village of Brooklyn, its police department and its police officers have no custom, practice or policy of illegal entry or illegal arrest. Accordingly the Village and its police department are entitled to summary judgment, as the doctrine of respondeat superior does not apply to civil rights claims. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). The McGuires did not contest this argument below, nor do they contest it now.

CONCLUSION

This is a case where the petitioners have demonstrated no compelling reasons for review. The petitioners have triggered none of the factors listed in Supreme Court Rule 10, nor have they shown any other basis for the Supreme Court to accept this case, which the courts below processed properly.

Respectfully submitted,

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No. 00-640

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

James McGuire, Lorraine McGuire, and Marital Minor Child,
PETITIONERS, Pro Se

vs.

Rock County, Rock Co. Board of Supv., Village of Brooklyn, Village of Brooklyn Police Dept., Dean A. Cornford, Terry G. Maybee, Thomas A. Schroeder, Craig Knutson, Charles A. Holznecht, Howard L. Erickson, James A. Dilley, Curtis N. Fell, Frank D. Dubanowich, Thomas W. Gehl, Arthur R. LeFeber, William Roberts, David Jon O'Leary, Thomas G. White, Stephen Carpenter, Gary L. Luhman, Richard T. Werner, Four Unknown Defendants,
RESPONDENTS

On Petition For Writ of Certiorari
To The 7th Circuit Court of Appeal

PETITIONERS REPLY BRIEF IN SUPPORT

Submitted on November 30, 2000

James McGuire, Lorraine McGuire, and Marital Minor Child, Pro Se Petitioners
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Respondents Miscontrue Our Complaint

Respondents misconstrue the allegations contained within our Complaint {ref. Dkts #1, #3} We always asserted no Respondent had lawful right to enter or remain in our private curtilage or within one square inch of our house--and had no probable cause to support the seizures and subsequent formal arrest, lacking arrest authority inside our home and doing acts the Constitution prohibits. We never agreed our case involves issue of whether excessive force was used by an officer while making a lawful arrest--instead alleging the arrest was unlawful and no Respondent held right to use (nor to approve use of) force of any kind or extent against any McGuire family member. Fell's sole basis for "resisting" charge was that Mr. McGuire refused to answer Fell's questions and then went to hold his child. This was in absence of Fell providing Miranda warnings before or during his coercive questioning in which he roughed up Mr. McGuire while demanding he confess to having been an intoxicated driver hours earlier. The Supreme Court held, in Ullmann v. United States, 76 S. Ct. 497, 500-501, the Constitution gives a witness the privilege to remain silent:

> "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege."

We have all along vigorously asserted our right to use reasonable force to ward off unlawful agressive seizure of our persons by officer illegally inside our house and to protect our young child from that threatening intruder. No probable cause exists that Mr. McGuire violated Wis.

Stats. 946.41 inside our house, with Fell failing to meet its underlying statutory criteria. Complaint alleges McGuires were subjected to coercive questioning in violation of the 5th Amendment--speaking directly to the fact no Miranda warnings were provided to either James McGuire or his wife prior to Fell's accusatory questioning of each.

A Jury Does Not Determine Legal Standard
It is not within province of a jury nor within discretion of a district court judge to create an individualized interpretation of what is a home entry.
"In any event, the District Court as well as the Courts of Appeals must follow the decisions and interpretations of our highest court in spite of any individual predilections that may exist." United States v. Chase, 281 F.2d 225 (1980)

No Pre-Knowledge of Presence of Intruders
The record on appeal does not indicate Mrs. McGuire had pre-knowledge, or could anticipate, that she would find any person, let alone a law enforcement officer, having broken into her home. She had no means to anticipate the strange man (whose head she momentarily saw outdoors below the home after she awoke to family dog barking and doorbell ringing, before she went to contain the dog in another area of the house in preparation to answer her front door) would break into her house thru her locked front door while she was putting her dog away. Fell swore that from the enclosed kitchen porch he observed Mrs. McGuire taking her dog to another area of the house (but denying he found our front door locked)--Fell presumably peering into kitchen door's small curtained window.

After Mrs. McGuire discovered Fell inside the home, she had a brief interchange with him and watched him leaving, she turned off the light and re-locked that inner kitchen door which separated her bodily from Fell--and had attempted to close it as Fell pushed it back open. {ref. Dkt. #89} It is clear that Constitution affords protection within one's private curtilage and inside the physical boundaries of one's house, with "entry" made by crossing home's outer threshold.

Fairness, Context, and Record Sufficiency
The record on appeal is plentiful as to provide opportunity for meaningful review, with our petition citing the record from numerous certified docket entries to show full context and meaning of Respondents' sworn assertions. FRAP Rule 10 allows records of proceedings other than official transcript to be part of record on appeal; also there is partial official transcript on record as to district court proceedings in addition to record McGuires provided; finally, the layperson transcript (to which no one timely objected to its accuracy) is within certified docket entries in record on appeal, filed in district court in support of our motion to vacate final judgment. All Respondents received timely notice of the issues involved in the appeal and had ample opportunity to themselves place on record additional official transcripts they felt essential.

No Contradiction In Our Argument
Police ignored our outdoor doorbell by not remaining OUTSIDE the home to wait for an occupant to answer our front door. The officers claims they did not see or use it (or lack of memory) does not change

fact that our lighted outdoor doorbell existed, that it was easily visible, and in operable condition. We We emphasize that under the particlar facts of this case, it was unreasonable for either officer NOT to remain outside our house (regardless of whether it was cold that night) until an occupant came to front door of our house to respond. Rock County Respondents, on p. 7 of their brief in oppos., use smoke-and-mirrors tactic of ommitting critical parts of a paragraph they cited (of Mrs. McGuire testimony in Dkt. #89), excluding her detailed testimony as to such facts as ice and condensation being on the home's outside door obscuring visibility thru it , her only seeing the head of a strange man outdoors below the house, her holding her child the entire time (even as she put her dog way), and as to her confront-ation with Fell who pushed open the inner kitchen door against her shutting it.

Up until second day of trial, Fell had filed sworn affidavits and discovery responses asserting Mrs. McGuire had answered home's front door and there consented for Fell to enter the home, where Fell after taking a few steps inside saw in plain view the sleeping Mr. McGuire such to justify seizing him.

Complaint's Issues Not Fully Litigated Should Be Reviewed

Although Mr. McGuire challenged his arrest for lack of probable cause (and on other grounds) within his motion to dismiss 1996-1997 criminal resisting prosecution, this issue was never addressed in state circuit criminal court (dismissal with prejudice ruling was made before Werner ever allowed Mr. McGuire to litigate either Fell's lack of arrest

authority or the clear lack of probable cause) nor in federal district court (where Judge Shabaz made erroneous finding probable cause existed for the arrest, citing Dilley later approved it and Holznecht's 2/3/97 finding at initial hearing held 34 days after the warrant-less in-home arrest--and based upon proven false statements of Fell and Dubanowich). Unconstitutional government intrusion into our home cannot fairly provide basis for probable cause that Mr. McGuire criminally "resisted".

"If the observations of either or both of those officers constituted a "search", the search was clearly illegal. ...We need not discuss the propriety of ... 'search before arrest' doctrine since that doctrine does not confer legality upon a search which furnishes the requisite probable cause for the subsequent arrest." People of State of California v. Hurst, 325 F.2d 891, 898.

Respondents improperly request issue preclusion as to valid issues we brought forward in our Complaint and continued to raise on appeal, with district court sweeping them away without allowing us to fully litigate them.

"The general rule is that issue preclusion attaches only when an issue is actually litigated and determined by a valid and final judgment." Mitchen v. Helms, 530 U.S.__ (2000) (5th Cir., decided June 28th, 2000)

Respondents' misreliance on Davis v. U.S. Ruling, and Constitutional Standard

Respondents' reliance on Davis v. United States, 327 F.2d 301, 303 (9th Cir., 1964) is misplaced, in that there, officers came to home's outer front door during daylight hours, knocked on it, waited for a

response, whereupon someone opened the front door and stated "Come in." In instant case, police first approached darkened house in isolated rural setting in dead of night, did not wait for occupant to answer front door, forced open outer locked door to the farmhouse, and was discovered inside the first room by an occupant moving towards front of her house to investigate who was outside her house and what he wanted. Her right to withhold consent for entry and search was taken from her by the officers taking what they wanted --first Fell forcing open our home's outer locked door and later Roberts walking right in. Subjective standard used in Davis to determine intent of police has been replaced with an objective standard applied to police conduct. The only "threshold" relevant to legality of police entry is the one at the "front door of any man's 'castle'", being our enclosed kitchen porch door that closed to the great out-of-doors. Officers' deliberate blindness as to our lighted operable doorbell outside the house mere inches from front door's doorhandle cannot be rewarded. Such physical home invasion as applied to then-existing Wisconsin statutory law on 12/31/96 and applicable to deemed to have official capacity--constituted criminal trespass. Not one of the named Respondents should have their conduct, as a matter of law, looked upon as pursuant to discretion.

Pursuant to Whren v. United States, 116 S. Ct. 1769 (1996), proper focus of fourth amendment inquiry is objective conduct conduct of the police officer.

Court in United States v. Blount, 98 F.3d 1489 (5th Cir., 1996), found district court's factual finding as to officer's state of mind was inapposite to question

presenting of whether officer's conduct invaded defendants' legitimate expectation of privacy in the curtilage of their home.

"It is based upon the reality of an actual intrusion into a constitutionally protected area. ...'It may be that it is the obnoxious thing in its mildest and least repulsive form; but the illegitimate and unconstitutional practices get their first footing that way, namely by silent approaches and slight deviations from legal modes of procedure." Boyd v. United States, 116 U.S. 616, 635.

Because district court refused to acknowledge our reasonable expectation of privacy within fence-enclosed yard surrounding our home and within even the first room of our house, and failed to instruct as to presence of coercion relative to consent for police continuing a search already underway, the jury verdict delivered on improperly stated legal basis should be given no deference.

"Because the district court's ruling was influenced by an incorrect view of the law the factual findings on this issue are due no deference." United States v. Capote-Capote, 946 F.2d 1100 (5th Cir., 1991), cert. denied, 112 S. Ct. 2278 (1992). As to "peeping-Tom" nature of Fell spying on Mrs. McGuire's movement through her house while he stood in a place he no right to be, his conduct may be likened to that of officers in Brock v. United States, 223 F.2d 681, 685 (5th Cir., 1955):

"Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his right to be let alone as guaranteed by the Fourth Amendment." Amendment."

"The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511 (D.C. Cir., 1961)

Fell's unlawful entry and search cannot later provide Roberts with a basis of lawful authority to barge right in the house unannounced and remain inside first room of our home until his presence was discovered at time Fell ordered Mrs. McGuire to go into the kitchen (from dining room) and "Get that door!" as he pushed Mr. McGuire to the front of house.

Case Placed In False Light To Jury

Factfinding by district court judge as to Roberts and by 11/98 jury as to Fell--upun an improperly stated rule of law as to consent is irrelevant to Complaint's proper resolution, given district court's improper view taken as to McGuires curtilage and first room of their home, not open to the general public. Our case was placed in a false light before the jury, and provided jury with incorrect standard of law upon which to deliver verdict. No verdict was delivered upon a properly stated rule of law as to to retroactive consent for police home entry and search. District court failed to contemplate, or provide jury instruction on, presence of coercion negates occupant's ability to make voluntary waiver of her and her family members constitutional rights. District judge abused his discretion by making express rulings to prohibit McGuires from presenting to the jury critical objective evidence which discredited officers'

material claims as to "implied consent", "implied mutual aid request", objective facts underlying the basis for the entry and search, as to facts material to Mrs. McGuires' conduct and demeanor, and objective facts as to the officers numerous home entries (the number of, timing of, sequence, and substance of)--to show further acts of wrongdoing material to resolution of our Complaint. Those biased rulings combined to deprive jury of making any informed reliable credibility determinations.

No Deference Due Excessive Force Verdict
The jury verdict as to "excessive force" must be given no due deference, in that the standard of law presented to them--over Petitioners' objections (see Dkts. #164, #167, #171 as to plaintiffs objections to standard of law)--which eroneosly Fell and Fell had made a lawful arrest of Mr. McGuire and held right to use force in making that arrest. District court also failed to inform jury of McGuires' right to resist aggressive unlawful seizure and to protect our young child from a hostile home intruder.

District Court "Extraordinary Statement"
Respondents' citation of district court Judge John C. Shabaz's "extraordinary statement", which trashes McGuires' motives and accuses us of perjury, reveals the "extraordinary" extent of prejudicial bias district court judge provided in his handling of our case, displaying his personal bias against pro se plaintiffs, with his unfair prejudicial comments and rulings issued from the bench before, during, and after trial--demonstrating his personal disdain for ourselves and civil actions against the kinds of defendants in our case.

Clear Error As to Implied Request Finding
There is no reasonable basis in the record to support finding that Green Co. Sheriff Dept. made an "implied" mutual aid request on 12/31/96 for Rock Co. Sheriff Dept. to handle a matter within in Rock County. Record reveals personal frolic on part of Fell and Roberts in making a legally unauthorized late-night "pursuit to investigate" outside their limited police jurisdictions, inside McGuires' private curtilage and within their home's inner sanctum.

Roberts' Unannounced Home Entry
Roberts testified he made unannounced entry into first room of McGuires' home subsequent to Fell's entry, with district court's skewed view of constitutional standard as to the first room of a house, erroneously found "implied consent" for Roberts to enter McGuires' home.

Conclusion as to Petitioners' Reply
Respondents briefs in opposition do not merit this Court to deny granting our petition for writ of certiorari. Material to some Respondents claim of retroactive "consent" being given by Mrs. McGuire, the circumstances she was subjected to, and her reactions to it, are void of element of voluntariness on her part such to willingly waive the privacy and due process rights of herself and her family. We humbly ask for opportunity for these citizens rights to be fully adjudicated.

James McGuire, Lorraine McGuire, and on behalf of Marital Minor Child
Pro Se Plaintiffs-Petitioners

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